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TRANSCRIPT OF RECORD

IN TWO VOLUMES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 487

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES E. O'DONNELL ET AL.

Volume II

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1937.
CERTIORARI GRANTED NOVEMBER 8, 1937

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INDEX

	Page
Record from D. C. U. S., Northern California	1
Names and addresses of attorneys	1
Bill of complaint	2
Exhibit "A"—Grant to Don Victor Castro	19
Exhibit "B"—Decree nunc pro tunc, No. 311	20
Exhibit "C"—Deed recorded January 5, 1853	22
Exhibit "D"—Letter of Navy Department dated February 9, 1853	28
Exhibit "E"—Patent recorded June 6, 1879	30
Exhibit "F"—Patent No. 1013879	33
Exhibit "G"—Letter from Department of the Interior to the Commissioner of the General Land Office, dated March 8, 1928	35
Exhibit "H"—Writ of peremptory mandamus	37
Exhibit "I"—Return to writ of peremptory mandamus	40
Answer of defendant Edmund Burke	45
Exhibits "A" and "B"—Plats	55
Exhibit "C"—Letter from U. S. Surveyor General to General Land Office, dated August 7, 1879	59
Answer of Defendant Walter E. Burke	61
Answer of Defendant Villa M. Behan	74
Answer, joint and several of Defendants James E. and Juanita O'Donnell	75
Answer, joint and several of Defendants Fletcher M. Slosson, Dorothy Slosson, Frank Clifford Morse, Frances Morse, Eleanor Caroline Whitman, and Alfred Whitman	86
Stipulation for amended pleadings	98
Answer of James E. O'Donnell et al. to amended bill of complaint	100

Record from D. C. U. S., Northern California—Continued. Page
Motion to dismiss amended bill ... 122
Stipulation re amendment of answer ... 123
Answer of Frank R. Devlin ... 125
Order reviving suit ... 126
Stipulation re answer of Walter E. Burke ... 127
Amendment to bill of complaint ... 128
Motion to exclude certain evidence ... 129
Motion to dismiss bill under reserved objections ... 141
Motion to strike from bill ... 153
Order on motions ... 160
Findings of fact and conclusions of law ... 160
Decree ... 202
Petition for substitution of attorneys and order thereon ... 206
Petitions for substitution of parties defendant ... 208
Statement of evidence ... 212
Note re plaintiff's exhibits ... 213
Testimony of:
Iva Frances Bailey ... 213
Frank E. Barker ... 213
Plaintiff's Exhibit "C"—Transcript of the proceedings in case No. 307 ... 217
Plaintiff's Exhibit "E"—Bissell and Aspinwall deeds ... 301
Plaintiff's Exhibit "F"—Report of Smith board re adoption of naval site ... 328
Plaintiff's Exhibit "G"—Report of Sloat board ... 337
Plaintiff's Exhibit "H"—Letter of February 9, 1853 and February 12, 1853 ... 379
Plaintiff's Exhibit "I"—Photostatic copy of Darlington survey by Heindcourt ... 384
Testimony of:
Alfred M. Sobieralski ... 396
Edgar E. Long ... 417
Gustave Stahl ... 478
Plaintiff's Exhibit "M"—Report of Captain Sawyer in 1878 ... 481
Plaintiff's Exhibit "NN"—Cross section map ... 530½
Plaintiff's Exhibit "O"—Corrected report of Spanish and American grants complete to February 25, 1886 ... 531
Plaintiff's Exhibit "P"—Letter from General Land Office to Secretary of the Interior, dated September 22, 1905 ... 532
Plaintiff's Exhibit "Q"—Decision of the General Land Office, dated September 16, 1914 ... 542
Plaintiff's Exhibit "R"—Letter from the Secretary of the Navy to the Secretary of the Interior, dated February 12, 1925 ... 553
Plaintiff's Exhibit "S"—Field notes and report of James E. Freeman, dated 1877 ... 558
Plaintiff's Exhibit "T"—Report of W. J. Lightfoot, January 6, 1915 ... 559
Plaintiff's Exhibit "U"—Report of Francis E. Joy, October 28, 1922 ... 561
Testimony of Henry L. Van Winkle ... 567
Plaintiff's Exhibit "W"—Excerpts from history of Solano and Napa Counties ... 568

Record from D. C. U. S., Northern California—Continued.
Statement of evidence—Continued. Page
Testimony of Mary M. Doyle 652
Plaintiff's Exhibit "X"—Certified copy of record and map from United States vs. Pacheco 653
Plaintiff's Exhibit "Y"—Notice in Daily Alta California 696
Plaintiff's Exhibit "Z"—File of documents in Freeman Survey 699
Plaintiff's Exhibit "Z1"—File of letters 734
Plaintiff's Exhibit "AA"—Documents, Third Session, Forty-sixth Congress 749
Testimony of F. A. Steiger 752
Plaintiff's Exhibit "CC"—Record of certification of school land warrants, Solano County 753
Plaintiff's Exhibit "DD"—Survey found at pages 114 and 115 of same record 758
Testimony of Carl A. Carlson 762
Plaintiff's Exhibit "EE"—Log of Mare Island from time of first commandant, Commodore Farragut 768
Plaintiff's Exhibit "FF"—Letter of Commandant Rodgers to Commodore Rodgers, February 26, 1873 779
Plaintiff's Exhibit "LL"—Letter of John Rodgers to Board of Supervisors of Solano County 799
Plaintiff's Exhibit "MM"—Tidal Planes 803
Plaintiff's Exhibitt "QQ"—Letter of John Rodgers to Robert Gardner, February 24, 1873, and letter of Gardner to Rodgers, November 25, 1873 838
Plaintiff's Exhibit "SS"—Letter of Edward T. Nichols to William Chandler, dated December 22, 1883 841
Testimony of John F. Greathead 851
Plaintiff's Exhibit "YY"—Criticisms of map of 1854 862
Colloquy 892
Stipulation and order approving statement of evidence 906
Notice of appeal 906
Assignments of error 908
Order allowing appeal 939
Stipulation for costs on appeal 940
Stipulations and orders re transmittal of exhibits 943
Amended praecipe for record 951
Praecipe for additional portions of record 961
Clerk's certificate 963
Citation and service 963
Proceedings in U. S. C. C. A., Ninth Circuit 966
Order of submission 966
Order directing filing of opinions and decree 966
Opinion, Denman, J 967
Dissenting opinion, Haney, J 1009
Decree 1034
Praecipe for entry of appearance 1035
Order directing amendment of opinion, denying petition for rehearing etc. 1035
Order extending time within which to apply for writ of certiorari 1035
Order staying issuance of mandate 1036
Clerk's certificate 1036
Order allowing certiorari 1037

(Testimony of Alfred Modesto Sobieralski.)

Q. Is it your understanding of the meaning of the word that it does not mean in close proximity?

A. In such close proximity as there is no lost space between them.

Q. Can there be land with any space between that is contiguous?

A. I should think so.

Q. Do you know what the word is made up from?

A. I have studied Latin.

Q. Tell us what it means.

A. I cannot think off-hand of the root.

Q. Isn't it your general understanding it means apart, separated, in close proximity?

A. It brings to my mind the idea of touching.

Q. Of touching?

A. Yes.

Q. In other words, that chair is contiguous to the floor because it touches, is that the idea.

A. I would not use it in that sense.

Q. Are you contiguous to that rail because you are leaning against it?

A. Yes, I think I am. [235]

Q. Are you a part of it?

A. No.

Q. So you are separated?

A. Well, you can play upon words like that.

Q. I am not. I am asking you under your own definition whether you are part of that rail, or whether you are separated.

A. I would also say this post is contiguous to the rail.

(Testimony of Alfred Modesto Sobieralski.)

Q. How many times have you been on the witness stand in your life?

A. This is the first time in my life.

Q. You think that post is contiguous to the rail?

A. Yes.

Q. Why don't you say it is attached?

A. I would say so, but you wanted an example of the word contiguous.

Q. That is, you think the words contiguous and attached have the same meaning?

A. Very nearly.

Q. How nearly?

A. There is some slight distinction.

Q. What is the distinction?

A. When you speak of attached, that means tied to it securely, while contiguous may be separated from it.

Q. May be separated from it?

A. Yes.

Q. I will take the answer. Now, you said there was no difference between salt and fresh water marsh in the definition of the Coast Survey?

A. No.

Q. Do you know anything about the alleged improvements on 34?

A. Only that our charts have.

Q. Take that chart which you say was issued in 1918, does it show a solitary improvement on what we call 34?

A. It shows buildings and roads beyond the Machine Shop?

(Testimony of Alfred Modesto Sobieralski.)

Q. It shows what kind of buildings?

A. It is indicated with a solid black square which indicates prominent buildings.

Q. You know what kind of buildings they are?

A. One distinguished with an outline of the building is considered a building of less prominence than one that is indicated with solid lines. [236]

Q. It is alleged in the 569 bill that there is a dwelling house upon a certain portion of the land. Now, assuming that that dwelling house is a shanty 10 by 12 feet, without windows or doors, would you say that was an improvement on land?

A. That depends on what interpretation you are using. In the legal interpretation I believe it is.

Mr. BURKE: That is all.

Redirect Examination.

Referring to the line marked on "Exhibit 2 for identification", "Shore Line 1852", that line is very close and probably was meant to be the same line on the Cutts map.

Q. By the words "High Water Line, line of High Water, 1852, Shore Line 1852", is that correct?

A. That is what it states on this map, "Shore Line 1852".

Q. Is that or is it not a correct interpretation of that line as depicted on the Cutts map?

A. It is not a correct interpretation of that line.

(Testimony of Alfred Modesto Sobieralski.)

Q. What was the date of that map before you?

A. This map is September, 1919.

Q. Does that map contain any indication of mean high water line at that time?

A. Mean high water line is indicated by the solid line extending around the Island.

Q. Does it contain any indication on it of the map-maker's determination of mean high water line as it existed in 1852?

A. This line is marked "Shore Line, 1852."

Q. Is there any indication on that map of mean high water line in 1852?

A. There is no statement to that effect.

Q. Is there anything on that map that indicates whether the map-maker's judgment of shore line constituted higher high water, mean higher high water, or mean high water, or the line of neap tides?

A. I do not see anything on here which specifies that tide the man was using to interpret the shore line.

Q. I show you Exhibit marked 3 for identification, and ask you [237] what this line is that runs between the corner of Machine Shop as designated on the map and ends in a broken line drawn roughly east and west across the map. Do you know what is indicated by that?

A. I believe that is an interpretation of that same line which is shown on the previous exhibit.

Q. It is a rough drawing of the line as shown on the Cutts Map of the division between marshland and fastland, and that map indicates, does it

(Testimony of Alfred Modesto Sobieralski.)

not, the construction of a levee running from Mare Island Strait in a general northwesterly direction, and intersecting another line of levee or dyke which intersects it at the southwest corner of the map. Is that correct?

A. Yes.

Q. Exhibit 4 for identification seems to be a map made in 1906, does it not?

A. Yes.

Q. And by its legend seems to be a map of Mare Island between Steam Engineering Building and the swamp and overflowed lands, Survey 569?

A. Yes.

Q. I find on that a dotted-and-dashed line passing from the Machine Shop generally in the neighborhood of the Machine Shop, and ending in a broken line at 109 contour—by the way, will you explain to the Court what the 109 contour is, what is the significance of that 109?

A. 109 is a line of equal elevation of 109 feet above the plane of reference between mean lower low water.

Q. And the 100 indicates what?

A. 100 was accepted as an arbitrary figure for the elevation of approximately this plane which is known, and 109 indicates 9 feet above that plane.

Q. Then the fact that this broken line ends between contour 109 and contour 110 indicates that it starts between 9 and 10 four feet above lower low water. Is that correct?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. And the line intersects the 110-foot contour, 111-foot contour, 112-foot contour, and 113-foot contour, and 112-foot contour, and where it passes off and intersects all the contours down to mean lower low water. Is that correct?

A. Yes.

Q. Do you find anything on that line that says 1863 shore line [238] that represents the judgment of the map-maker that that was the purpose of the line from the Cutts Survey?

Mr. BURKE: Do you call the engineer the map-maker?

Mr. PECKHAM: Whoever made this map?

Mr. BURKE: Do you mean to say an engineer who makes a survey and runs the courses and distances, metes and bounds, is a map-maker?

Mr. PECKHAM: The person who made this map is a map-maker. Undoubtedly, it was made under the direction of an engineer. Do you find anything on this map to indicate whether the line marked "Shore line 1863" or "'63 shore line" is the map-maker's judgment, that that is the location of high water line, higher high water line, mean high water line, or the line of neap tide?

A. No, there is nothing to indicate what tides are referred to.

Q. If that line is the line indicated on the Coast Survey, is that statement, "1863 shore line," a correct or an incorrect interpretation of that line on the Cutts Survey?

(Testimony of Alfred Modesto Sobieralski.)

A. If this line is the one from the Cutts Survey, it is not a correct interpretation.

Q. So that the map-maker in 1906, to the extent that he represented the line as the shore line of 1863, would have been mistaken in placing the shore line that was sought to be represented by the line of the Cutts Survey?

A. Yes.

Q. Would that also be true as to the correctness or incorrectness of his interpretation of the line as indicated on the Rogers Survey of 1856?

A. If that line were interpreted as the shore line it would be an incorrect interpretation.

Q. Directing your attention to Exhibit 5 for identification, I will ask you if that purports to be a map based upon a survey made by or under the direction of the map-maker?

A. The note states here it was published for R. A. Eddy, Marysville, California, and then gives authorities. It says the coast line is from data furnished from the U. S. Coast Survey.

Q. Then the map, as I understand, is simply a compilation from the [239] data supplied by the Coast Survey maps that were made under the authority of the Coast Survey prior to that time?

A. That is what the statement here says, regarding the coast line, from the Coast Survey office at Washington, and includes the work of 1852.

Q. Does it purport to be a representation of a survey made by or under the direction of the map-maker?

A. No, it states "Compiled by."

(Testimony of Alfred Modesto Sobieralski.)

Q. Now, I direct your attention to a representation of Mare Island on this map, and indicate to you a white line purporting to cut the isthmus or neck of Mare Island; does that line correspond with the line of fastland as indicated on the Cutts or Rogers Survey?

A. It apparently does at the northern end of the high land.

Q. Directing your attention to the Machine Shop point as represented on the top of Mare Island, and placing that as the eastern-most end of the line of fastland dividing fastland from marsh land on the Cutts and Rogers Surveys, does that white line across the isthmus or neck correspond to that line?

A. It appears to be somewhat further north.

Q. Do you know the general location on that map or swamp and overflowed No. 34?

A. Very approximately, yes.

Q. Is that line north or south of the south boundary of 34?

A. It apparently is to the northward of the south boundary.

Q. Do you find indicated in that location on any map, or any of the maps that have heretofore been introduced any indication of a water course in that neighborhood?

A. None of the Coast Survey maps indicate any water course in that neighborhood.

Q. Now, on Exhibit No. 6 for identification, the line marked with an "X" at the left-hand border of that map, placed so it points north, is labeled

(Testimony of Alfred Modesto Sobieralski.)

"Mean high water," and the datum is given, 105.6, and that indicates that the map-maker located that line, does it not, as mean high water, and that the line of the high water was [240] 105.6 above the datum plane, which is 100 feet below mean lower low water. Is that correct?

A. Yes.

Q. Now, here is a broken line running from the northwest corner of the Machine Shop over to a place called tank, and it is marked "Original high water line." Do you find that?

A. Yes.

Q. Now, this map, by the way, was made—it bears date 1925?

A. Yes.

Q. That represented the judgment of the map-maker at that time that that was the high water line, the original high water line at Mare Island, does it not?

A. Yes.

Q. Do you find anything on that map that indicates whether he intended by that high water line, highest high water line, higher high water line, mean higher high water line, or mean high water line, or the line of the neap tide?

A. There is nothing on this map which indicates what plane he referred to.

Mr. BURKE: You are referring to water on the north end of Mare Island, as depicted on 5533, aren't you?

(Testimony of Alfred Modesto Sobieralski.)

Mr. PECKHAM: I am referring to Exhibit 6 for identification.

Mr. BURKE: Is there anything on the map to indicate whether it is low water or high water?

Mr. PECKHAM: I understand there is nothing on the map to indicate what is meant by high water line. Is that correct?

A. There is nothing on the map to indicate which plane he was referring to.

Q. By the way, does that line that was last called to your attention, original high water line, indicate on the map whether it is a surveyed line, or not?

A. There is nothing to indicate it has been surveyed.

Q. Directing your attention to Defendants' Exhibit No. 7 for identification, I find depicted a dotted-and-dashed line ending over here between 109 and 110 contours, indicated as line of upland and tule in 1863. Is that correct?

A. Yes. [241]

Q. Is that what is supposed to be represented by that line?

A. There is a further note down in the title.

Q. In the title of the map?

A. Yes.

Q. Reading, "The line of upland and tule in 1863 is shown by a heavy double-dotted-and-dashed line"?

A. Yes.

Q. Can you state whether or not that is the line indicated as the dividing line between marsh and fastland in the Rogers Survey and the Cutts Survey?

(Testimony of Alfred Modesto Sobieralski.)

A. It closely approximates that line. Without a very careful comparison I could not say definitely that it is that line, but from its general shape I would say it agrees very closely with that line.

Q. The line apparently crosses contour 110, 111, 112, 113, cuts across 112 again, then cuts across 113 again, and cuts across 114, 113, 112, 111, 110, 109, etc., to its end in the northeast corner of the Machine Shop. What is the significance of this contour on this map?

A. It appears to me that that line possibly cannot go across these elevations.

Q. These elevations represent, do they not, the elevation of the land at the point where the dotted line crosses them above the datum plane, which is 100 feet below mean low water. Is that correct?

A. Yes.

Q. It is found first between 109 and 110 contours, which is between 9 and 10 feet above lower low water?

A. Yes.

Q. Where it crosses 113 and 114, that it is 13 and 14 feet above lower low water. Is that correct?

A. Yes.

Q. From that fact, can you say whether or not it is possible or improbable that that truly represents the line of mean higher high water in 1863?

A. I do not see how it could possibly represent the line of mean high water in 1863.

Mr. PECKHAM: I think that is all. [242]

(Testimony of Alfred Modesto Sobieralski.)

Recross Examination.

Mr. BURKE: Q. Do you consider your judgment of the accuracy of the map of which you were last talking today from an inspection, and from surmise, and from opinion, and from your thought, superior to that of the map-maker who made it in 1863 while on the ground? You say the map-maker did not mean that, and did not mean anything, he did not intend to say "shore line" when he said "shore line"?

Mr. PECKHAM: I think that map, Exhibit 7, is dated 1906. You said 1863 all the time.

Mr. BURKE: I will revise the question.

Q. Do you consider your judgment of the accuracy of maps today better than the judgment of the map-maker who made those maps their respective dates?

A. These maps are conflicting——

Q. Just a moment, I asked you if you considered your judgment as to the designation of the maps today better than the judgment of the surveyor or map-maker on the dates they purport to bear?

A. Confining my judgment to these maps, I would say yes.

Q. You consider your judgment better?

A. Than these maps that have been considered, yes.

Mr. BURKE: That will be all. [243]

TESTIMONY OF EDGAR E. LONG.
Witness for Plaintiff.

I am the Assessor of the County of Solano. My office is in the Court House at Fairfield. I have been such Assessor since January, 1899. I am familiar with the records of that office regarding assessments of what is now known as Mare Island. During my own time as Assessor or in the time of my predecessors, as disclosed by my office records, there is no record that what is known as Swamp and Overflow Survey No. 34 has ever been returned by the persons claiming the same for assessment. Since my term in office, the records do not show that any part of that property has ever been assessed or that it has even been assessed since March, 1928. My records do not show that any patentees of the Government to this property have ever returned it for assessment to my office.

Cross Examination.

Mr. BURKE: Q. I show you a certificate of redemption from tax sale made in the year 1873 by the State. Does your office record show anything about that?

A. It does not.

Mr. BURKE: I ask that that be marked for identification, if your Honor please.

(The certificate of redemption is marked "Defendants' Exhibit 1 for identification.")

TESTIMONY OF GUSTAVE STAHL.
Witness for Plaintiff.

I live at 138 25th Avenue, San Francisco. I am a lawyer, practicing in San Francisco, and am admitted to practice in all the Courts of California and in the Courts of the State of New York. I have also been admitted to practice law in Guatemala. I am familiar with the legal terms in use in Mexico and Guatemala. A part of my business consists of translating Mexican and Spanish documents into English. I have made a translation of "Plaintiff's Exhibit L-1" and produce the translation so made, which is in all respects true [244] and correct. The translation contains the translation of the Spanish words blocked in on the top and on the right-hand side of the map. (The translation was attached to "Plaintiff's Exhibit L-1".) I have translated "Plaintiff's Exhibit L-2" and produce the translation made by me, which is in all respects true and accurate. The pencil markings on the map opposite the Spanish names correspond to the numbers on the list. (The translation was annexed to "Plaintiff's Exhibit L-2".) I have made a translation of the map shown to me, marked "Plaintiff's Exhibit L-3" for identification and I produce the translation so made. (The document was marked as "Plaintiff's Exhibit L-3" for identification.) I have translated the map shown to me and produce the translation which is in all respects true and correct translation from Spanish into English. (The document was annexed and marked "Plaintiff's Exhibit L-4"

(Testimony of Gustave Stahl.)

for identification.) I have translated the map now shown me and produce the translation thereof which is in all respects true and correct. (The map and document were annexed together and marked "Plaintiff's Exhibit L-5" for identification.

Mr. PECKHAM: I call your attention to certain figures here on L-2, 1895. Is that or is it not a typographical error?

A. It should read 1595 rather than 1895.

Mr. PECKHAM: May we have that corrected in the translation, your Honor?

The COURT: Yes.

I have translated Government's Exhibit "D" and produce the translation which is in all respects true and correct. (The translation was annexed to "Plaintiff's Exhibit D".)

Referring to the words "de utilo", the word should probably read "util", which is a form of ownership and consists mainly of having the advantage of whatever fruits or thing is the subject of the ownership. It also involves possession and is a transferable interest. [245]

I am a graduate of the University of Berne. I studied under Mr. Huber, the present President of the International Court of The Hague. I have also studied law at Columbia University Law School and while there was a pupil of Mr. Justice Stone of the Supreme Court and also John Bassett Moore, formerly Judge of the International Court of The Hague. I was practicing in Guatemala for about

(Testimony of Gustave Stahl.)

eight months in the office of Jose Matos, who is an authority on International Law.

Referring to the phrase appearing on the face of what purports to be a grant by Governor Alvarado: "en declarar conio declaro por el presenti", this is a usual phrase in grants in the Spanish language, the proper translation of which is "I declare by these presents". That phrase is unusual in Spanish documents of that character, but it occurs at times—I have come across it.

I have in my business had occasion to translate documents of considerable antiquity and would say that in an old document that particular phrase was more used than it is today.

Referring to the phrase in this deed, "Dn. Victor Castro dueno en propriedad", the translation is: "Owner in ownership". It would not be a proper translation of that purpose to translate it owner in fee simple. The phrase is usually in documents of that character and there is nothing unusual about it. The phrase creates an allodial ownership, which is the fullest type that can be acquired under the Spanish law. [246]

INTRODUCTION OF EXHIBITS.

Mr. PECKHAM: I would like at this time to introduce in evidence the report of Captain Sawyer in 1873, who was one of the members of the Sloat Board.

(The document was received in evidence, marked "Plaintiff's Exhibit M".)

PLAINTIFF'S EXHIBIT M

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States of America
[Insignia]
Navy Department

I hereby certify that the annexed printed copy of Report of the Board of Civil Engineers appointed to prepare a plan for the Improvement of the Navy Yard at Mare Island, California, 1873, is a true copy of the original on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams
Secretary.

Report of the
Board of Civil Engineers
Appointed to prepare a plan for
The Improvement of the Navy Yard
at Mare Island, California
1873.

Report of the Board of Civil Engineers Appointed to Prepare a Plan for the Improvement of the Navy Yard at Mare Island, California. 1873.

Bureau of Yards and Docks, Navy Department,
Washington, D. C., September 16, 1873.

Sir: By authority of the honorable Secretary of the Navy, a board of civil engineers has been ordered to assemble at the yard under your command, for the purpose of revising the plan of the yard.

The particular instructions to this board will be submitted to you on the arrival of the members at Mare Island, which will probably be about the 26th or 27th instant.

This board will consist of civil engineers W. P. S. Sanger, Calvin Brown, and F. A. Stratton, and the Bureau will be pleased to have you give them such advice and suggestions as your long experience and great knowledge of navy yard matters will enable you to furnish, and also to allow them such facilities as may be necessary to enable them to perform the duty for which they have been convened.

Respectfully, your obedient servant,

C. R. P. Rodgers,
Chief of Bureau.

Rear-Admiral John Rodgers, U. S. N.,
Commanding Navy-Yard, Mare Island, Cal.

Bureau of Yards and Docks; Navy Department,
Washington, D. C., September 17, 1873.

Sir: By authority of the Secretary of the Navy, you are hereby appointed president of a board of civil engineers, whose duty it will be to carefully examine the navy-yard at Mare Island, California, and to present this Bureau with a well-considered, economical, and coherent plan for its further development, having in view all the needs of a first-class navy-yard, and the harmonious relation of its various departments.

The board will recommend the grades to be established, the streets and roads, and tramways to be prescribed, and the division of the area of the navy-yard, among the several Bureaus of the Navy Department. In this connection it may be desirable to recommend the exchange of some of the buildings now occupied, so that the workshops and storehouses may be grouped for the greater convenience of the different departments. The board will study the water-front of the navy-yard, the character of the channel that washes it, its currents and its deposits, and will recommend the best method of securing convenient quays for vessels to be at, with deep water, and so constructed that they may be scoured by the current and the necessity for dredging may be in some degree avoided.

The enlargement of our facilities for docking, repairing and building ships will receive the most careful consideration of the board.

The board will also consider the best and most economical means of furnishing the navy-yard with an ample supply of fresh water; it will choose a site for a reservoir, and it will consider the cost and feasibility of an artesian well.

It will notify the Vallejo Water Company that it is ready to receive and discuss any project that the company may desire to offer, for supplying Mare Island with water, and that it will report to this Bureau upon such proposals.

The estimate in all that pertains to the supply of water must be carefully stated.

The board will also examine the present expensive and unsatisfactory system of lighting the navy-yard, and recommend such change as will secure greater economy.

The board will present to this Bureau with its report a map and plan like that recently made for League Island, exhibiting the depth of water, the height and character of the land, the assignment of space to the Bureaus, and the structures already existing, using the same symbols as those employed on the League Island map.

It will also present its opinion as to the expediency of substituting concrete for granite in the construction of the quay-walls, and the best means of getting a secure foundation for those walls at a moderate cost. It will also study and report a plan for making roads and paving the streets at Mare Island, suitable to the peculiar soil and weather of

that locality; the system hitherto in use having proved unsatisfactory.

Estimates for the quay-walls and street-making will be submitted for the guidance of the Bureau, and such other estimates as may be required for work of more pressing need.

In carrying out these instructions you will ask the counsel and suggestions of the distinguished officer now in command at Mare Island, whose large knowledge of hydrography and navy-yard administration gives great weight to his opinions.

You are authorized to employ a draughtsman, and a writer, if you think one is necessary. An office at the navy yard will be furnished by the commandant, to whom you will report and exhibit these instructions.

Civil Engineers F. A. Stratton and Calvin Brown have been ordered to report to you as your associates on this board.

When it shall have completed its important duties you will return with Civil Engineer Stratton to Washington.

I have the honor to be, very respectfully, your obedient servant,

C. R. P. Rodgers,
Chief of Bureau.

Chief Civil Engineer W. P. S. Sanger, U. S. N.,
Bureau of Yards and Docks, Washington, D. C.

Navy-Yard, Mare Island, California,
November 19, 1873.

Sir: The board of civil engineers appointed by your order of the 17th of September last to examine the navy-yard at Mare Island and prepare a plan for its future improvement and development on a large scale, has the honor to report that, in obedience to your order, it assembled at said navy-yard on the 29th of September, 1873, and entered at once upon the discharge of the duties assigned to it.

Mare Island is situated near the outlet of Napa Straits, its southern end being opposite the entrance of the Straits of Carquinez, and its westerly shore washed by the waters of San Pablo Bay.

The extreme length of this island, including a large tract of tule on the northern side, and extending toward Napa and Sonoma, is about ten miles, and its average width, including tule, about three-quarters of a mile.

The area of upland is 741 acres, and of the tule-lands on the east side, which will be available for yard purposes, is 135 acres.

No accurate measurement has been made of the area of the tule on the northern side, but an approximate area is 3,973 acres. Its shore at the southern end is precipitous and the land high, the highest point being about 300 feet above high tide. Along the westerly shore, which is washed by the waters of San Pablo Bay, the water is quite shallow, and will admit the approach of no vessels of any size above that of ordinary small boats.

A considerable portion of the southern end of the island is so high as to render it unsuitable for the location of workshops or store-houses, but parts of it will furnish good localities for reservoirs for the storage of water.

Mare Island is the only naval establishment on the whole Pacific coast, and must, in the future, supply all the wants of the Northern and Southern Pacific squadrons, as well as those of the Asiatic seas.

We are fully impressed with its importance, and of the necessity for supplying it with ample facilities of all kinds to meet the many and great demands which may be made upon it.

After an examination of the island, and the various buildings which have already been erected, and a careful study of the wants of the service at this important station, we have prepared a plan for its future improvement, which we think will provide all the various buildings, docks, and other improvements necessary to constitute a complete and perfect naval establishment of first-class size and equipment.

In the arrangement of this plan care has been taken to utilize and preserve, as far as possible, the buildings which have already been erected, and it is found that, with the exception of a small timber-shed, a saw-mill, and three buildings for officers' quarters, all other storehouses, workshops, and quarters can be made to harmonize with and form a part of the general plan which we have adopted.

The buildings thus far erected are good, substantial, well-built structures, and although some of them are now used for purposes different from what we contemplate in the future, they will answer equally well when transferred as we propose, and the changes of occupants will produce no inconvenience, as they will be made only as new buildings are erected.

Accompanying this report are three plans:

No. 1 is a general plan of the whole island, including the tule-lands, and showing a portion of the shore on the opposite of the Napa Straits.

Plan A represents the island, with part of the northern tule, and shows its present condition, with all the buildings and improvements, as they now are, and also the additional buildings, docks, and other improvements which we recommend.

Plan B represents the yard as it will be when all the proposed improvements are completed.

Soon after our arrival the commandant of the yard, Rear-Admiral John Rodgers, informed us that a question had been raised as to the validity of the title held by the United States to the tract of tule on the northerly side of the island leading toward Napa and Sonoma; in fact, that certain parties actually claimed to own a portion of this tule by virtue of a title held from the State of California. This distinguished officer has expended much time and labor in the investigation of this question, and has prepared an elaborate and instructive report to the Chief of the Bureau of Yards and Docks, giving

all the facts which he has been enabled to obtain, and recommending the employment of the United States district attorney to make further research.

We regard this question of title as one of very great importance to the Government, and, as it is purely a legal one, we concur with the admiral in the opinion that the law-agent of the Government is the proper person to pursue the investigation, and that the matter should be committed to his charge without delay. We would further remark that, in case the Government title should prove defective, we regard the possession of this tule as very advantageous, and recommend that immediate steps be taken to secure an undisputed title to the property. This board, however, presumes that the title is in the United States, and acted upon that presumption in preparing the plan for the future improvement of the island.

Upon comparing the chart of soundings taken by the officers of the Coast Survey in 1872 with those made by the commissioners in 1852, it appears that the deep-water lines have receded from the shoreline, while the depths in the channel are not materially changed; the chart of 1872 showing, in a few places, deeper water than that of 1852. The width of the channel is somewhat less, the water having shoaled on the Vallejo side.

We find no record of observations having been taken to ascertain the velocity of the current, but it is the opinion of several persons who have long resided here, and are familiar with the river, that the current is now considerably stronger than for-

merly. The changes which have occurred have doubtless been produced by local causes, and it is believed that when the shore-line of the yard shall have been built, as proposed, the effects of the current along this straight line of wall will be to scour the front and maintain a proper depth of water.

The first step taken in preparing the plan was to establish the location of the front line of the quay-wall. The space between the line of buildings and the present front wall is only 100 feet, which is too limited for large operations. The water along that front is shallow, and the line, when extended, is not sufficiently remote from the line of tule to admit of the basins and railways which we propose, without encroaching too much upon the uplands; and, for these reasons, we have located the front line 100 feet beyond the present line. In connection with this location was the determination of a proper height for the wall and dock coping, and this was found to be a question requiring much careful study, as it was necessary to establish this height at a point which would best serve the purposes of a landing-wharf, and also afford the most numerous opportunities for docking vessels.

The present quay-wall coping is unnecessarily and inconveniently high, rendering it difficult to discharge cargoes from small or medium-sized vessels at low water. And it is too high for the coping of the dry-dock, for at that height nearly two feet of the proposed depth of water on the gate-arch would be lost, except in rare cases of extreme high tide.

The reliable tidal observations which have been made at this yard are rather limited in number, and do not extend over a long period of time. Other observations have been made, but, unfortunately, the plane of reference has been lost. Some important facts, however, have been preserved, from which we have been able to ascertain the points of the highest and lowest tides known to have occurred during a long period of years. With these facts, and such data as could be obtained from the tidal record, we have established the height of the quay-wall and dry-dock coping at a point 1.81 feet below the level of the present quay-wall coping, and we believe this height will be found well adapted to both purposes. It will be a much more convenient height for unloading small vessels at any state of the tide, and will render the dry-dock available for docking vessels of the largest draught of water during the high tides, and secure a larger range for its use during the lesser tides. There is a peculiar feature in the range of tides at this place, and it is this, that there are what are called "greater high tides" and "lesser high tides," and these alternate regularly; and as the time of high water falls about 40 minutes later each day, these "greater high tides" occur sometimes during the day and sometimes during the night, and this feature somewhat complicates the question.

By reference to the accompanying plan A it will be seen from the diagram showing the range of tides that the height of the highest known tide was

2.20 feet below the point established as the heigh
of the dock-coping, and with such a tide there woul
be 30.30 feet of water on the gate-sill of the dock
The lowest known low tide was 12.03 feet below th
coping, and that at such a tide there would be 20.4
feet of water on the sill. The average height of al
the "greater high tides" observed is 4.50 feet belo
the coping, and gives 28 feet of water on the sil
The average of all the "lesser high tides" is 5.4
feet below coping, and gives 27.08 feet of water o
the sill. The average of the "greater low tides" i
9.16 feet below coping, and gives 23.34 feet of wate
on the sill. The average of the "lesser low tides"
is 11.14 feet below coping, and gives 21.36 feet o
water on the sill; and the average of all low tides i
10.10 feet below coping, and gives 22.40 feet of wate
on the gate-sill.

From this examination it is evident that at al
times of high tide there will be at least two feet o
water on the gate-sill in excess of the depth at hig
water on the miter-sills of the stone dry-docks a
the other navy-yards; that vessels drawing 28 fee
may be docked at the highest "greater high tides;"
vessels drawing 27 feet at an average of all hig
tides; and vessels drawing 26.50 feet at an averag
of the "lesser high tides." It is also evident tha
at an average low tide a vessel drawing 22 feet o
water could pass over the sill.

Having located the front line of quay-wall an
established the height of coping, the next proceedin
was to divide the available area of the yard amon

the several bureaus as nearly as possible in proportion to their respective requirements; and as this is the only naval station on this western coast, ample and liberal provision has been made for all the buildings and other improvements which may be needed for the accommodation of the various branches of work to be executed and the large quantities of material and stores which must necessarily accumulate at this point.

The Bureau of Construction and Repair being considered as first in importance, its wants were first carefully considered, and it was apparent that the object of first necessity was to provide ample facilities for constructing, launching, and repairing ships, and for these purposes a suitable number of building-slips and dry-docks must be provided. The question of the kind of dock best adapted to the wants of the service was fully discussed, and the opinion arrived at was unanimous.

Two of the members of this board were also members of a former board of engineers appointed to prepare a plan for the development of League Island, which board fully and thoroughly investigated the subject of dry-docks, and came to the same conclusion, that the system of floating-docks in connection with basins and railways for taking vessels on and off the land, or what might properly be called the American system is the best, and will furnish greater facilities by the expenditure of a given sum of money than any other known plan. This system is no untried experiment, it having been adopted by the Government more than twenty

years ago and been in successful operation since that time at the navy-yards at Kittery, Philadelphia, Pensacola, and Mare Island. At the first-named yard many vessels have been taken on and off the land, and among them one of our largest and heaviest ships, the Franklin, was taken on shore, repaired, and again put afloat with perfect ease and safety.

We, therefore, recommend the adoption of this system at this yard, and have arranged a basin with railways on a scale commensurate with the importance of this great western establishment.

The stone dry-dock now in course of construction, and the basin and railway already built and in use, form proper starting points for the location of works for this bureau; and we propose to occupy that portion of the eastern shore of the yard, south of these, to near the lands occupied for magazine purposes, for the accommodation of works appertaining to the Bureaus of Construction and Repair and Steam-Engineering.

The present shallow basin was designed to receive but one vessel, it being only large enough for one railway, and it is proposed to extend this basin 2,385 feet south, so as to provide space for twenty-four railways. The floating dry-dock now in use is of wood, and at present is in good order, having been recently repaired; it has a lifting power of 4,000 tons, and probably, with the aid of two other sections, which need repairing, a vessel of 4,500 tons displacement might be raised with safety.

This dock will doubtless prove serviceable for several years to come, but we recommend that when it shall again require a thorough repair a new dock be built of iron. The proposed extended basin and railways, in connection with a properly constructed floating-dock, would be capable of raising and taking on shore ships of any size which will probably ever be constructed for our navy. New ships may be built upon the railways, taken upon the floating-dock, and placed afloat without incurring the expense or risk attending the launching of large ships. The stone dry-dock now being constructed will be of ample capacity to receive vessels of the largest class, the depth of water on the gate-sill at high tide being 27.5 feet, or 2.5 feet more than any of the other stone docks in the country. This dock, as before stated, with the floating-dock, basin, and railways, will furnish the necessary facilities for building and repairing twenty-six vessels of the largest class at the same time, thus placing Mare Island, in this respect, on a footing equal or superior to the largest dock-yard of Europe.

At the northern end of the yard we have located a shallow basin in connection with twelve railways for laying vessels on shore when not needed for active service. These railways will store twenty-four ships of the largest class, or a proportionally larger number of smaller size, in safe position, where they may be kept clean and always in condition to be put afloat at a few hours' notice and be ready for active service.

Should the exigencies of war require greater docking facilities, these railways last described, although not very convenient to the workshops and other buildings, might be used for building or repairing purposes.

Immediately south of and adjoining the large shallow basin and railways for building and repairing is a deep basin where large vessels may lie afloat at all times of tide, either when fitting or completing, or when laid up in ordinary, or when undergoing repairs which do not render docking necessary. This basin is 3,318 feet in length, 1,038 feet of which is 449 feet wide, and the remaining 2,280 feet is 410 feet wide, the whole containing 46.30 acres.

South of the deep basin, and separated from it by a causeway 100 feet wide, is the timber-pond, 1,200 feet by 789.37 feet, and containing 21.75 acres. On the east side of the shallow and deep basins and timber-pond is a causeway 100 feet wide, which will afford berths for a large number of vessels to load or discharge cargoes. Along the western side of these basins are the different store-houses, offices, workshops, and manufactories required by this bureau for the accommodation of the various classes of workmen, and for the protection of its large quantities of material and general stores.

The wants of this bureau have been carefully considered, and it is believed that ample provision has been made for the accommodation of the different branches of work. The work-shops are large, and are so grouped together as to bring the works most immediately or intimately connected conveniently

near each other. It is proposed that the space allotted for the saw-mill shall be excavated so as to form a timber-pond beneath the mill, and convenient for the storage of such timber as may be needed for immediate use. When all these store-houses and workshops are erected and supplied with the necessary machinery and tools, they will enable this bureau to employ a very large number of workmen, and to meet all the demands that may be made upon it in cases of extreme emergency. Immediately south of the space allotted to the Bureau Construction and Repair, and along the line of the deep basin, is the area assigned to the Bureau of Steam-Engineering. All the buildings which can ever be required for this bureau are provided for, and those in which the heaviest work will be performed are placed along the line of the basin-wall, so as to be convenient for putting heavy machinery into and out of vessels lying in the basin. Ample shops are provided for all the different branches of work to be performed, and storehouses for the storage of materials and finished work; and the whole establishment is such as to furnish all the facilities required at this station.

The board would have preferred placing the buildings and other improvements intended for the use of the Bureau of Equipment and Recruiting in close connection with those belonging to Construction and Repair and Steam-Engineering; but the form of the available land is such as to render such an arrangement difficult and inconvenient; the line of front being a straight line, and the width of the

island in that portion so limited as to involve the necessity of extending the works of the latter two bureaus along nearly the whole southern part of the entire front.

We have, therefore, devoted the whole eastern shore-line from the principal avenue leading across the island south as far as a point near the area allotted for magazine purposes for the use of the Bureaus of Construction and Repair and Steam-Engineering, and reserved the portion of the water-front from the same avenue north to and including the present steam-works for the use of the Bureaus of Equipment and Recruiting, Provisions and Clothing, Navigation, and Ordinance.

By this arrangement vessels requiring repairs to their hulls or machinery would receive them at the lower basin, and, when completed, would be hauled to the upper end of the yard to complete their equipment and receive their equipment-stores and coal, batteries, and ordnance-stores, and their provision and clothing; all the store-houses and work-shops for these different departments being in close proximity.

Sites have been assigned for all the workshops and store-houses required for the Bureau of Equipment and Recruiting, and they are arranged in a compact and convenient manner.

A large and commodious building is provided for a sale-loft and storage for canvas and sails, another for rigging-loft and storage of fitted rigging and cordage.

Shops for the manufacture of anchors, chains, and galleys, and suitable areas for the storage of anchors and chains, are indicated on the plan, and large store-houses are laid down for the storage of equipment-stores of dismantled vessels.

The coal-house is located near the water-front, and will be so arranged that coal may be received or delivered on board ships in an expeditious and economical manner. The capacity of the coal-depot is 25,000 tons. In the rear of it is another depot for the Bureau of Equipment and Recruiting, capable of receiving 12,000 tons. The rope-walk being necessarily a very long building could not be conveniently grouped with the other buildings of this bureau, but the site selected, although detached, is not far distant, and will be of convenient access.

The space selected for the Bureau of Provisions and Clothing is adjoining that for Equipment and Recruiting, and a sufficient amount of storage has been allowed to meet all requirements of a very large establishment.

This station being so far distant from others, and the wheat on this coast being of such excellent quality, it was deemed proper to provide a large bakery, with store-room for the storage of flour and bread. It is also believed that at a future day it will be found economical for the Department to manufacture the clothing for the seamen of the Navy on this coast, and therefore ample room has been reserved for this purpose.

As the operations of the Bureau of Navigation do not require much space, a portion of one of the

buildings, within the area for Provisions and Clothing, has been assigned for the purpose.

The site selected for the Ordinance Bureau is at the extreme northern end of the upland, and is at present occupied in part by Steam-Engineering.

When the proposed new buildings for the last-named bureau are completed and occupied, workshops now occupied by it will answer an excellent purpose for the Ordnance Bureau, and each will be separate and distinct in itself. For the use of this bureau sites have been selected for all the necessary workshops and store-houses, and abundant space for gun and shot parks.

The magazine, coming also under charge of this bureau, is located near the extreme southern end of the island.

The Bureau of Medicine and Surgery does not require much room for yard purposes, nor does it require the exclusive occupation of water-frontage. We have allotted it a small space near the office-building and dwellings for officers, which will be quite sufficient for its purposes.

The large naval hospital, also under charge of this bureau, is located toward the southern end of the island. It is a fine building, with ample grounds adjacent for cultivation and ornamentation.

The Bureau of Yards and Docks not requiring special use for water-front, has been located in a central position, and provision has been made for its store-houses and workshops, stables, gas-works, and buildings for the preservation of engines, cars, &c.

An area has heretofore been allotted for marine barracks, officers' quarters, and parade-ground. To preserve uniformity in the arrangement of buildings it has been found necessary to move the northern boundary sixty feet farther north, and that boundary has been moved on the plan without detriment to other claims.

As before stated, the area of the upland is 741 acres; of the tule on the east side of the yard, now being fast filled in by the earth excavated from the new dry-dock pit, 135 acres; and of the tule on the northern and western end of the island, about 3,973 acres, making an aggregate of 4,849 acres. The areas appropriated for the various purposes of the navy-yard, according to the plan prepared by the board, are shown by the following table:

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
Construction and Repair	*Feet*	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices	.....	.....	32.146	11.027	25.385	.....	68.558
Dry-dock	.....	.....	.....	.....	1.987	1.385	3.372
Building-ways for twenty-four vessels	.....	.....	.....	25.155	3.782	.....	28.937
Basin for building-ways, (shallow)	.....	.....	.....	.....	6.671	23.744	30.415
Storage-ways for twenty-four to thirty-six vessels	.....	.....	.....	19.153	4.685	.....	23.838
Basin for storage-ways, (shallow)	.....	.....	.....	.....	4.086	9.458	13.544
Timber-basin, (reserve)	.....	.....	.....	.....	6.289	21.746	28.035
Fitting and rigging basin	.....	.....	.....	.....	5.667	20.552	26.219
Total construction and repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering							
Work-shops, store-houses, and offices	.....	.....	13.592	6.159	12.695	.....	32.446
Steam-basin	.....	.....	.....	.....	8.589	26.054	34.643
Total steam engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089

Equipment and Recruiting	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices	952½	.....	10.755	8.541	12.453	.....	31.749
Ordnance							
Workshops, store-houses, and offices	.....	.....	6.795	12.859	14.872	.....	34.526
Magazine, (land, including buildings)	.....	.....	.....	22.448	6.364	.....	28.812
Total ordnance	887⅔	.....	6.795	35.307	21.236	.....	63.338
Provisions and Clothing							
Workshops, store-houses, and offices	525	.....	4.327	1.481	5.612	.....	11.420
Navigation							
Workshops, store-houses, and offices	.....	.....	.298	.....	.401	.....	.699
Medicine and Surgery							
Workshops, store-houses, and offices	.....	.....	.115	.....	.133	.....	.248
Hospital, (land, including buildings)	.....	.....	.....	31.210	2.095	.....	33.305
Total medicine and surgery	.....	.....	.115	31.210	2.228	.....	33.553

Yards and Docks	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices			5.373	8.440	6.110		19.923
Officers' quarters, (24)			.952	15.831	5.752		22.535
Workmen's quarters, (28)			.578	5.493	2.333		7.826
Parks and squares				19.771	5.264		25.035
Bay road, on southern and western shore, (3.017 miles)					18.231		18.231
Cemetery				6.675	.344		7.009
Total appropriated for yards and docks	263		6.903	56.200	38.034		101.137
Unappropriated							
Reservation A, not including Bay road				21.830	1.910		23.740
Reservation B, not including Bay road				376.585	4.914		381.499
Reservation C				9.935	2.536		12.471
Total unappropriated				408.350	9.360		417.710
Total under yards and docks			6.903	464.550	47.394		518.847
Marine-barracks, reservation, (land, including building-streets, not including Bay road				24.681	2.310		26.991

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
Yards and Docks—Continued	*Feet*	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Light-house reservation, (not including Bay road)	.....	.....	.....	4.890	.....	.....	4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	120.939	563.784
Total high land, unappropriated	.....	.....	.....	408.350	9.360	.....	417.710
Area of large tule, all that part not appropriated, (Reservation D)	.....	.....	.....	.....	.....	.....	3,935
Total island (nearly) as increased by improvements	.....	.....	.....	.....	.....	.....	4,916

RECAPITULATION

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Construction and Repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089
Equipment and Recruiting	952½		10.755	8.541	12.453		31.749
Ordnance	887⅔		6.795	35.307	21.236		63.338
Provisions and Clothing	525		4.327	1.481	5.612		11.420
Navigation			.298		.401		.699
Medicine and Surgery			.115	31.210	2.228		33.553
Yards and Docks			6.903	56.200	38.034		101.137
Marine-barracks reservation				24.681	2.310		26.991
Light-house reservation				4.890			4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	102.939	563.784
Total high land, unappropriated				408.350	9.360		417.710
Large tule, unappropriated, (Reservation D)							3.935
Total island (nearly) as increased)							4.916

In arranging the plan of the yard we have adopted as the size of building-blocks, generally, 230 by 400 feet. Some of them are a little larger, and a few are smaller. The width adopted for the streets is 70 feet, except along the front of the railways for repairing or building vessels, where it is 150 feet, and along the deep basin, where it is 100 feet wide.

The subject of road-making is one of great interest and importance, and has received due consideration. In this country where all the rains of the season fall in a few weeks, and the character of the soil is such as to render the roads almost impassable during the rainy season, it becomes an imperative necessity that the utmost care should be exercised in their construction.

In the city of San Francisco the various kinds of wood pavements have been extensively used, but the results have not been favorable, and it is believed that they are now all regarded as failures; the authorities have abandoned the use of them and are resorting to other plans, the most popular of which are the Belgian block, the cobble-stone, and the macadam roads.

Some other plans are being experimented with, and we have made arrangements with parties in San Francisco to lay down some sample pavements for test. These will consist of a roadway 21 feet wide and 60 feet long for each kind, and they will be laid in a part of the yard where they will be subject to the severest tests, and be as equally exposed as possible.

The first sample will be what is known as the Parisen patent, and is similar to a pavement in the city of Washington, near the Arlington House. It will be put down by Mr. Frank M. Brown, the owner of the patent. This pavement is believed to be a good one if properly laid, but is very expensive. Its depth to the road-bed will be ten inches, and the cost $5.10¾ per square yard.

The next sample is that known as the hydro-carbonized brick pavement, and will be put down by the San Francisco Paving Company. This pavement is made of soft brick boiled in a mixture of coal-tar and sulphur; the bed is graded to the depth of 10¾ inches below the proposed surface of the pavement; a depth of 4 inches of wet sand, well rolled, is then laid upon it, common unprepared bricks are then laid flat-wise, in the ordinary herring-bone style, the joints being pretty large; these joints are then filled with hot coal-tar, and upon this lower course of bricks the prepared bricks are laid edge-wise, each being first dipped in hot coal-tar, and the whole well grouted with coal-tar, thus forming a thickness of about six and three-quarter inches of brick laid on four inches of sand. We have seen specimens of this pavement in San Francisco and Sacramento, both of which appear to have stood remarkably well, the first named having been in use about two and the last five years.

That in San Francisco is in a public street where there is a very large amount of travel, and that at Sacramento at a crossing to a coal-yard, where the

entire travel was confined to a certain part of the pavement. The cost of this pavement is less than either of the other two kinds to be tested, being $4.16 per square yard.

The other sample is the called asphalt road, and will be laid down by N. P. Perrine. This pavement is composed of broken lime-stone and asphalt mixed, and applied in a manner similar to that in which the roads in Paris are constructed, and will cost $4.50 per square yard.

These several kinds of pavements will be laid down in the yard at a point where a fair test can be made, but, of course, no opinion can be given of their relative merits until the results of actual use can be obtained.

The great extent of the yard will render an immense amount of paving of some kind necessary, if such roads are to be depended upon for the hauling to be done.

We are of the opinion that, in view of the great cost of paving and the great distances to be traveled over when the yard is completed, rail-tracks will be found the most economical and expeditious for the transportation of heavy materials and stores between distant points, and we have therefore laid down a system of tracks which will afford very easy access to all important points. These tracks should be supplied with cars and trucks of various kinds, and steam-engines for running them.

The western side of the island being exposed to the wash of the waters of the Bay of San Pablo, it

is necessary that some means should be adopted to prevent the encroachment of the water on that side of the island. We therefore recommend that a rip-rap wall be thrown up along the shore, and that a road-way be built entirely around that portion of the island.

There is a large quantity of stone laying along the shore, which will probably be sufficient for this purpose, and it is recommended that this work be commenced with a moderate force as soon as means can be obtained for the purpose.

In connection with the subject of road-building, the question of grades was considered.

The northern portion of the island, upon which the buildings and basins are located, is an undulating plain, a small part of which, comprising the tule-lands, is about five feet below the height of the quay-wall as established by the board, the remainder being dry land from five to twenty feet above the quay-wall, excepting a hillock of small area, which rises to the height of fifty feet. As a consequence of this formation of the ground, the amount of excavation required will be very moderate, and flat grades are practicable.

The excavation for basins is also reduced to a minimum by their location on the low tule-lands. The quay-walls fixed, as before stated, at a uniform height along the whole front of the yard, is the primary plane from which rises the grades of all the principal streets.

The proposed adoption of locomotives upon railways as the medium of traffic, and the possible ulti-

mate use of traction-engines for the same purpose, rendered the adoption of easy grades necessary. Such grades are also best suited to the floor-lines of buildings located along the streets, the board therefore determined to fix the maximum grade at one foot rise in one hundred feet. A few exceptions to this rule were made in streets not adjacent to workshops, by an increase of the maximum to 2.15 feet per hundred, in order to adapt the grades to structures already erected.

These maximum grades are all at right angles with the quay-wall, and with the line of greatest traffic. Streets parallel with the quay-wall and the longitudinal axis of the buildings, and in the line of greatest traffic, have much lighter grades, no cases in the vicinity of the workshops exceeding five-tenths of a foot per hundred feet. Streets over which heavy boilers and engines will usually be moved have no grades above five-tenths, and the streets leading from the quay-wall and the ordnance-foundry to the gun-park have the same easy grades.

In connection with the grades of the streets was considered the subject of the proper grades for the building and repairing ways and the storage-ways for vessels. The adjustment of all the elements entering into this question led the board to adopt as most suitable a grade of .75 foot per hundred. The grades and elevations above quay-wall coping are marked on the plan at the intersections of the different streets, and will readily be understood.

A long line of quay-wall having been projected, the attention of the board was directed to a careful consideration of the different modes of building such structures, and the adoption of such methods and material as would prove most economical, expeditious, and beneficial. The comparison was confined to two kinds of material, concrete and granite, the wall in either case to rest upon a properly prepared pile foundation.

In the English dock-yards, and in many other places where large heavy quay-walls are being built, concrete has almost invariably been adopted as the best material to be used, both on account of cheapness of first cost and also on account of its supposed superior durability. It is manufactured in large masses of any desired size and form, easily deposited upon properly prepared foundations, and arranged by workmen in bells or diving-armor, in the same manner as has been practiced in this country in constructing walls of granite for similar purposes. Careful estimates have been made in minute details of the cost of preparing these masses of concrete and placing them in position; liberal allowances were made for the cost of all material, and labor, and the entire use of Portland cement is contemplated.

The cost per linear foot of a concrete wall of suitable section, including the pile foundation and granite coping, is $278.98, while the estimated cost of a granite wall of the same section, including the same foundation, is $799.77 per linear foot, the cost of the granite being 286 per cent. greater than the

cost of concrete. The materials for making this concrete are abundant and cheap in this vicinity except the cement, which would be imported from England. The labor required in its manufacture would be of the cheapest kind; indeed, on a large scale, the introduction of labor-saving machinery would greatly reduce the cost, the only skilled labor needed being in placing the blocks in the wall.

We have no hesitation in recommending the adoption of this method of construction in building the long line of quay-wall which we have projected.

The water-supply of the island has also received our careful attention. The most important element involved in this question is the source of supply. The topographical and climatic conditions of the island are such as to preclude the possibility of any perennial resource, such as is ordinarily available when artificial works for the supply of water are undertaken. There are no streams nor adequate springs. The numerous wells that have been sunk from time to time, even to considerable depths, have yielded only a scanty supply of inferior drinking-water, while, in the case of an early experiment on the premises, in boring an artesian well, the attempt was abandoned at the depth of 218 feet on account of finding no water except such as was found near the surface. Up to the present time the water-supply of the island, especially for house and ship purposes, has been rain-water collected on the building-roofs and stored in expensive masonry-cisterns, the capacity of which at the present time

is about 1,390,000 gallons, exclusive of those of the marine barracks, hospital, and magazine; while for building purposes, steam-boilers, and the supply of cattle, the main dependence has been upon the yard-wells, from which generally the water has necessarily been obliged to be hauled, at no small expense, to the point of use. Under these circumstances, the decision of what may prove a reliable source of supply involved the most careful consideration, and in order to be able to present the most suitable selection, with a proper plan of works in connection therewith, the board have felt themselves called upon to make as thorough investigation of all the conditions of the locality as possible.

Having in view the fact that the adjoining town of Vallejo, as well as Oakland and the large city of San Francisco, are supplied from artificial reservoirs, filled chiefly by the rain-fall of their respective districts, the board was satisfied that the yard must be supplied by similar means. It was, however, aware of the experiment of the artesian well now being carried on at the Government arsenal at Benecia, the final success of which, if established within the time hoped for by the authorities of that establishment, may undoubtedly influence the recommendations which it, in the mean time, feels compelled to make under the great urgency of the wants of the yard, which require operations to be immediately undertaken.

The works at Vallejo, and those at the Spring Valley Water Company, by the latter of which San

Francisco is now supplied, were visited and examined, establishing in the mind of the board the conviction of the entire adequacy of the rain-fall storage system, where the conditions admit of its application, especially in a country like this, where none but the largest river-courses supply water throughout the season, all other streams remaining dry for at least half of the year. The application of this system to the yard was obvious, although it remained a question whether the locality itself furnished the required elements for its realization to the extent demanded. It was apparent, in case this should be answered in the negative, that we could with more certainty look to the adjacent territory, Vallejo and its connections, for the required supply, as the Vallejo Water Company has already established its feasibility.

It is obvious that the storage of any required amount of water on the system mentioned will depend on the two elements of available territory for a catchment area and the amount of rain-fall taken in connection with its mode of occurrence, the reservoir for storage being placed in a proper relation to the catchment area and to the locality where the water is to be finally used. So far as the territory of Mare Island is concerned, there can be no doubt, providing the requisite amount of rain-fall could be annually depended upon, that an abundant catchment area at a high elevation may be obtained, the only contingency in the matter being the rain-fall, which in some years is known to fail. At an eleva-

tion above the quay-wall coping of 110 feet, and above this to the highest point of the island, there are one hundred and forty-seven acres which can be drained into a reservoir, which may be so located as to command a head of about 100 feet above the said coping.

With a saving of twelve inches of rain-fall, and with reservoirs of sufficient capacity, there would annually be stored an amount of 48,000,000 gallons, amply sufficient for all the present wants of the yard, and probably for many years to come. This statement is made, however, not as a condition of things to be entirely depended upon for the yard-supply, but as an illustration of the general system by which this supply will be likely to be effected, and so far as the Island territory and the joint occurrence of its rain-fall are concerned, the feasibility of its being made to act a greater or lesser part in connection with other sources outside of it, which may be chosen for a supply.

The board has been informed of several sources of water-supply outside of the island by various parties representing proprietorship, who severally have addressed letters on the subject. One of these, and the largest probably in the State of California, is Clear Lake, which lies about sixty miles north of the yard. A company has been organized for several years, whose object is to construct suitable works for the utilization of this lake, operations having already been commenced, although not upon the line intended eventually to pass through the vicinity of Vallejo.

The accompanying letter, marked "A," received from the president of the Clear Lake Water Company, states the essential objects of this company, and gives a description of their water-source.

The accompanying letter, marked "B," received from Messrs. Burrage & Tucker, states the existence of another source of water-supply near the town of Yountville, situated in Napa Valley, and to the north of the yard, the point being about twenty-four miles distant.

The Vallejo source is quite a large artificial reservoir or pond, located about three and a half miles from the town. It is formed by an earthdam built across a narrow opening between high hills, its present area being estimated at about one hundred and sixty acres. The catchment area surrounding the reservoir is computed at over seven thousand acres, being in great part of a mountainous character, which quickly pours off the rain-fall into the pond. The elevation of the outlet of the discharge-pipe at the dam is about 32½ feet above the coping of the yard quay-wall, the entire head above this point being the elevation of the water-surface over the outlet, which ordinarily may be assumed at 35 feet, thus making the entire head over the quay-wall 67½ feet.

From the experience of the few years elapsed since the completion of this reservoir, taking into account its large dimensions, the quantity of water which has annually been stored, and the quantity distributed to the population of Vallejo, there seems

no reason to doubt its capacity to furnish all the demands of the navy-yard, should it be decided to adopt this method of supply.

In the cases of the two former sources, it is evident that no reliance for an immediate supply for the yard can be assured.

The development of the extensive works proposed by the Clear Lake Water Company may require some years before they will reach this vicinity.

The proposition of the proprietors of the Yountville source does not, in the estimation of the board, commend itself for adoption by the Government, although there can be no doubt that its sole possession of an adequate water-source, within a reasonable distance, in which economical works might be established, would be attended with very great advantages.

The conclusion of the board in reference to this water-supply question is, to recommend the adoption of the proposition of the Vallejo Water Company, as given in the accompanying letter of its president, of the 7th instant, marked "C," addressed to the commandant of the yard, and by him referred to the board. The price demanded for the amount of supply seems reasonable compared with the rates understood to be now paid by the water consumers of San Francisco to the Spring Valley Water Company, the price being about the same for a similar large quantity taken at once by our establishment.

In this recommendation it seems necessary to state the outline of the works required in connec-

tion with the delivery of the water at Vallejo at the point indicated by the company. It will be necessary, first, to connect with the company's pipe and lay across the strait a submerged pipe of, say. 5 inches interior diameter, leading to a proper fore-bay on the yard, placed at a sufficient elevation to obtain as much distributing head as the power of the company's reservoir and works will bestow; we can, probably, thus depend upon a head of about 60 feet above the coping of the quay-wall, as due to the pressure of the company's reservoir.

The fore-bay ought to be of sufficient capacity to hold a considerable quantity of water, at least 100,000 gallons, and be connected with the main distributing reservoir, which is to be placed at a sufficient elevation to give a high pressure over every building of the yard by means of a suitable pumping-apparatus, pipe, &c., by which this service-reservoir may be filled. The location of the fore-bay and reservoir is recommended to be on the hill to the westward of the hospital, as marked on the plan.

By this arrangement it will be seen that the system of pipes conveying the water to the fore-bay, and the connection of a discharge-pipe from the distributing reservoir to this system with proper branch pipes, valves, &c., will also form the distributing system for the yard-service.

The proposition of the Vallejo Water Company is recommended as the only one which, in the opinion of the board, is immediately feasible. An agree-

ment on the proposed terms, or lower if they can be had, may be entered upon for a certain number of years, while in the mean time the development in the general enterprise of water-works in the vicinity by other parties, with those that may follow on the island itself, through the undertaking of the storage of its own rain-fall, will probably lead to other more economical arrangements.

Reference has already been made to the feasibility of this last-mentioned plan, with the belief that it ought soon to be undertaken; although the annual rain-fall may not be regularly sufficient for the storage of a full supply of water, there may often happen seasons of abundance, when a considerable quantity can readily be stored.

We have caused such examinations to be made on the island as show a large catchment area, and a convenient site for a storage reservoir. The latter, when filled, as it often may be, will furnish a sufficiency for a very important supply for irrigation and other purposes.

Approximate estimates for the works required in connection with the supply from the Vallejo Water Company are as follows:

Pipe across Napa Straits	$ 7,000
Forebay and pumping apparatus	8,000
Distributing reservoir, main and service pipes	60,000
Pumping-house, hydrants, valves, &c.	4,000
Total	$79,000

It is to be observed that all these works will be available for any other source of supply than that of Vallejo, except that the pipe across the straits might require some different location.

Appropriate estimates for reservoir, &c., for storing the rain-fall on the island, are—

Storage reservoir	$15,000
Pipes, &c., to connect with distributing reservoir	5,000
Contingencies	2,000
Total	$22,000

The instructions of the board require its consideration of the cost and feasibility of an artesian well. They would state that, pending the operations at the United States arsenal at Benicia, before referred to in this report, and in view of a like experiment tried on this island several years ago, it considered this plan still problematical. Of its feasibility there can be no means of deciding in advance of actual success, proved in some near quarter where the geological conditions are like those of the island, such as is now hoped for at Benicia.

The subject of lighting the yard has received due consideration by the study of the present mode of effecting this purpose in comparison with other means with which we are acquainted. The present method is founded on the use of gasoline employed in conjunction with atmospheric air, the operation being effected by a very simple apparatus which

produces the required mixture of illuminating-gas, and forces the same into the large holder, from which by the necessary pipes it is carried to the points of consumption.

It is obvious from the nature of the principle involved in the manipulation of this gas, and providing the gasoline is of a proper gravity, that it may be made of high illuminating power, as is proven by photometrical tests. That it is economical, as compared with the present charges for gas in the cities and towns of this vicinity, is shown by the expenditure of material and labor employed from May 1 to September 30 of the past year, in its manufacture, during which the price of the gasoline has been reduced 20 per cent. from its former cost. During this time, we find the cost of manufacture to be $2.65, currency, per thousand cubic feet, charging in the account the whole wages of the gas-maker, who not only superintended the making of gas, but the repairs and maintenance of all the works.

The simplicity of this method of gas-lighting, in our opinion, commends itself for limited and compact communities. It is employed in several small towns on this coast, and has, we learn, given good satisfaction, for it has been continued several years at these places. There are reasons, however, for not recommending it as a permanent resource for this yard, especially when its works shall have become more numerous and spread over a greater extent. The enlargement of the plan will involve the handling of greater quantities of gasoline, which

thus proportionally may be considered to increase its danger, though on the present small scale of use and very careful handling, there is but little apprehension. It is an article of importation to this market, and by a few hands, to whom a time of scarcity or combination is a temptation to raise the price, while on the other hand the loss by its rapid evaporation, and its danger from careless exposure to fire, renders the storage of a large quantity inadmissible, when we might otherwise wish to avail ourselves of a low market to purchase it.

The present location of the gas-works and holder in our recommendation of the buildings of the yard is appropriated to the pumping-engine house for the new stone dry-dock. This location is between the wings of the present smithery, No. 69, and in our opinion is the most suitable point for such an object. This arrangement will necessitate the substitution of another site for the gas-works, which in our plan we recommend to be on one of the blocks, No. 51, assigned to the department of yards and docks.

The demand for the construction of the dock pumping-works of course will require the removal of the present gas-works and the commencement of the new establishment, and it is recommended that the operations therefor be soon undertaken. The new gas-works we recommend to be on the coal system of manufacture, with a capacity for making 40,000 feet per diem, which will be ample for many years to come for all the establishments of the

island. For the purpose of commencing the improvements proposed by the board, appropriations will be required for the objects mentioned in the following schedule of works; operations upon the objects to be commenced in the order in which they are named, and the whole to be finished within fifteen years, at the cost approximately stated opposite each object.

Schedule of works to be first built.

1. For grading 100,000 cubic yards per annum for ten years	$ 500,000
2. The quay-wall, 500 linear feet per annum, commencing at the south side of block No. 9 and running thence southerly to north side of block No. 29, afterward to be extended northerly to north line of block No. 2	2,500,000
3. For extension of floating-dock basin, and building and repairing ways, 675 feet, to include ways No. 8, and iron floating-dock, to be commenced as soon as the quay-wall, opposite, shall have been constructed	1,750,000
4. For wood and metal workshops for yards and docks, south and east side of square No. 34, 675 feet long	500,000
5. For carpenter and joiner shops for construction and repair, on square No. 11, 400 feet long	300,000

6. For machine-shop, store-house, and offices for construction and repair, all of square No. 39, 1,060 feet in length 700,000
7. For store-house and office for yards and docks, south side of square No. 35, 340 feet long 250,000
8. For temporary erecting-shop for steam-engineering, to be ultimately used for ordnance gun-carriage shops, north side of block No. 3, 400 feet 300,000
9. For sail-loft and store east side of block No. 5, 400 feet 300,000
10. For general store for ordnance, east side of block No. 18, 317 feet 250,000
11. For shell-house for ordnance, east side of block No. 17, 360 feet 250,000

The south half of block No. 8 to be temporarily occupied by equipment and recruiting for stores of returned vessels. For the permanent use of the Bureau of Steam Engineering.

12. For smithery, the east side of square No. 26, 400 feet long 200,000
13. For machine-shop, the east, south, and north sides of square No. 27, 600 feet in length 500,000

14. For boiler-shop, the west side of square No. 27, (for temporary use, to be eventually used as an erecting-shop,) 400 feet long	250,000
15. For store-house, the east side of block No. 46, 400 feet long	300,000
16. Foundery, east side of square No. 28, 400 feet long	250,000
17. For construction-basin complete	1,500,000
Total for fifteen years' construction	$10,600,000

We have the honor to be, with great respect, your obedient servants,

W. P. S. SANGER,
Civil Engineer, United States Navy.
CALVIN BROWN,
Civil Engineer, United States Navy.
FRANKLIN A. STRATTON,
Civil Engineer, United States Navy.

Commodore C. R. P. Rodgers, U. S. N.,
Chief of Bureau Yards and Docks,
Navy Department,
Washington, D. C.

A.

Office of the Clear Lake Water-Works,
3 and 5 Front Street,
San Francisco, November 3, 1873.

[P. O. Box 1443.]

Dear Sir: In view of the well-authenticated fact that the United States navy-yard at Mare Island

should have an increased supply of pure fresh water at an early day, to meet the requirements of the Government at that most important station, we would respectfully inform you that the Clear Lake Water-Works, (a corporation duly organized under the laws of the State of California, and having its principal place of business at San Francisco,) is expecting within a reasonable period to afford abundant facilities for the supply of water to the navy-yard, Vallejo, Benicia, and other points on and near the line of its proposed canals, with their adjuncts, for bringing the waters of Clear Lake to the city of San Francisco.

Our source of supply, Clear Lake, is one of the largest water-sources in the State of California. It has an area of about eighty square miles; its average depth is about forty-five feet; it stands at an elevation above the sea of about 1,500 feet, and it is fed by several large streams draining a mountainous surface of about four hundred square miles.

The company is now actively engaged in the work of construction, though not on the main line to San Francisco, which will pass near Mare Island. The water will be brought at an ample height to cover all the buildings at the navy-yard. Its quality has been thoroughly tested by assays made by Professor Rising, of the University of California, Professor Falkenan, State assayer of California, and Professor Price, of this city; and it is pronounced by them to be exceedingly well adapted to domestic and industrial purposes.

The Clear Lake Water-Works fully expect to be in a position in a comparatively short time to enter into a contract on the most favorable terms to supply the navy-yard with all the water it can require under any circumstances. It has, therefore, seemed to the board of trustees that you should be made acquainted with these facts at this time, in order that any arrangements for the supply of water now needed may be of such a temporary nature as not to prevent the Government from availing itself hereafter of the facilities which only this company can furnish.

Very respectfully, yours,

JOHN BENSLEY,
President Clear Lake Water-Works.
SAMUEL J. C. SWEZEY,
Secretary.

Capt. W. P. S. SANGER,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

B.

Yountville, October 30, 1873.

Sir: Understanding that a supply of pure fresh water is needed at the Navy-Yard, we wish to call your attention to a supply in our possession which we feel sure will amply fill all your requirements in that respect.

The stream is situated about eleven miles from Napa City, across the valley on the east side from

Yountville. It is a never-failing stream of pure spring water. We own two hundred acres of land through which this stream passes, probably, over one mile in length on this land. It is estimated there is at least 150 feet fall in this same distance.

There are ample facilities for making dams and constructing reservoirs on the stream that will alone hold four times the amount of water you now require.

We will sell these two hundred acres of land with all our rights to the stream, excepting we retain the right and privilege under all circumstances of building and maintaining a dam across the stream, if none is built by the purchaser near, at a point high enough to convey the water to our present building, with at least ten feet ahead at the point of starting; also the right to enter upon said land at any and all times for the purpose of laying or repairing an end-pipe to connect with the water in said dam, and the full control of all the water that will run in said pipe. With these reservations secured to us we will convey all our right and title to the balance for $10,000. It would give us much pleasure to show you the property before the rains commence. Whatever conclusions you may arrive at please to inform us as soon as convenient afterwards.

Yours truly,

BURRAGE & TUCKER.

Capt. W. P. S. Sanger,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

C.

Vallejo, November 7, 1873.

Proposal of the Vallejo Water Company to supply water to the Mare Island Navy-Yard:

The Vallejo City Water Company will furnish pure fresh water to the extent of 33,000 gallons per day, or 1,000,000 gallons per month, delivered from the pipe of the company at the foot of Georgia street, in the city of Vallejo, for the sum of $5,000 in United States gold coin per annum, payable in twelve equal monthly payments of $416.67 each. The Government to furnish its own pipe or mode of conveying said water to Mare Island.

[Seal] A. CHOBOT,

President of the Vallejo Water Company.

PAUL R. HUBBS,

Secretary.

Rear-Admiral John Rodgers, U. S. N.,

Commanding Mare Island Navy-Yard.

Respectfully referred to the board of civil engineers.

JOHN RODGERS,

Commandant.

We offer in evidence a map from Volume 6, Page 5 of Bancroft's History of California, showing the grants and their location and what was covered by those grants.

(The document was received in evidence, marked "Plaintiff's Exhibit N".)

SAN PABLO BAY

STATION 2

STATION 6+20

STATION 10+40

STATION 13

STATION 19

STATION 21+50

STATION 24

STATION 34

Mean High Tide

+5.8

M.L.L.T.

LEVEE

SAND RIDGE

Pond

Slough

1852

1906

1917

1931

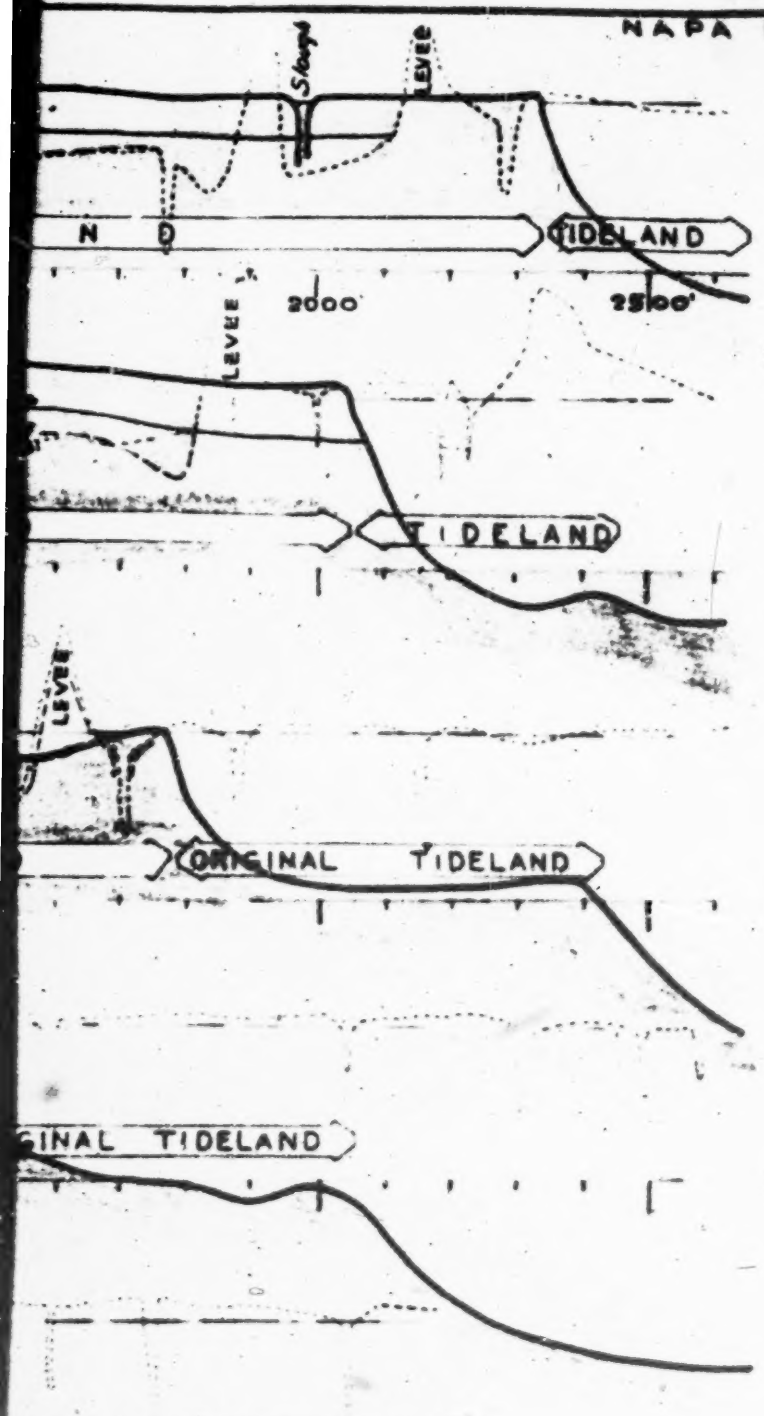
ORIGINAL TIDELAND

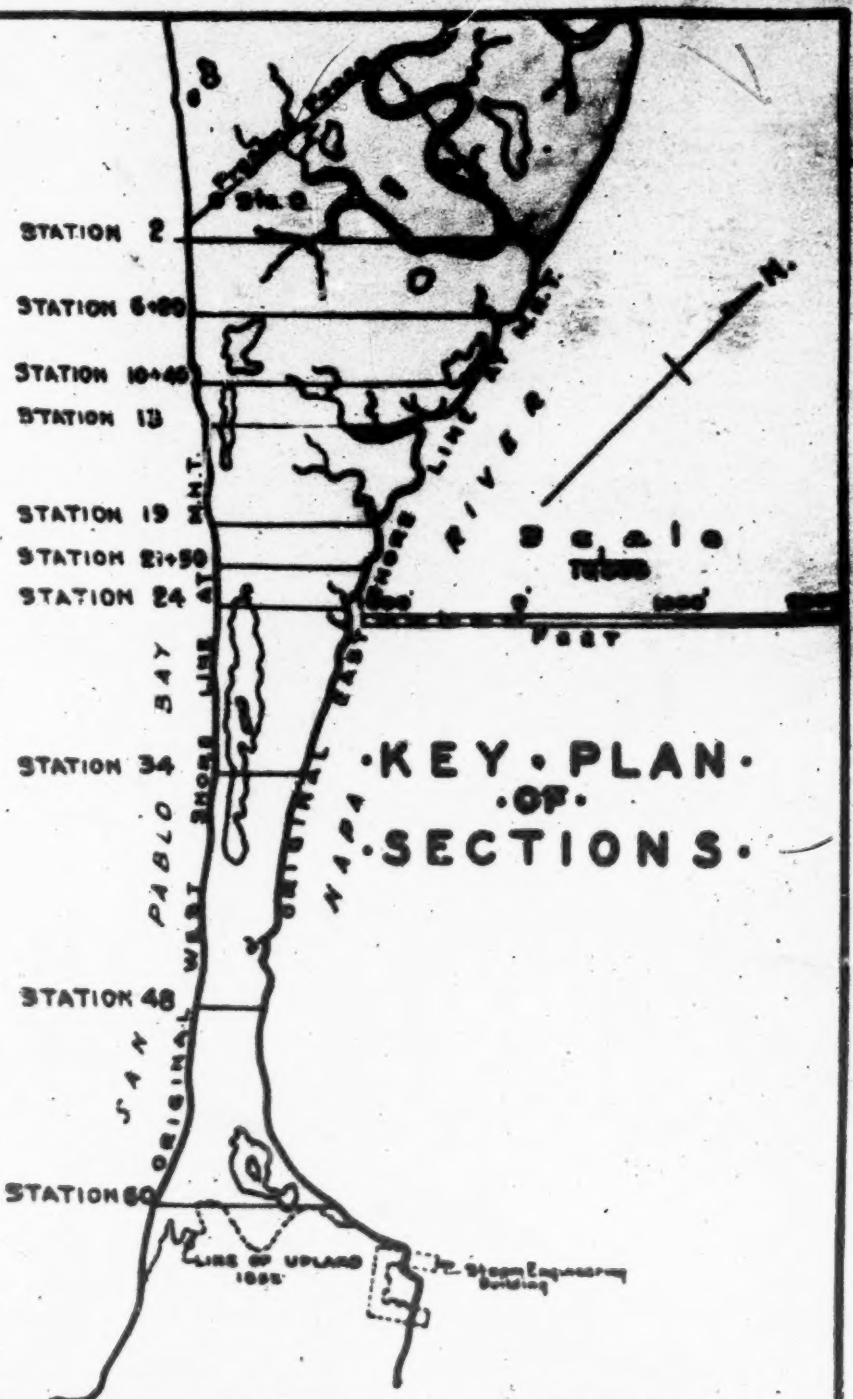
ORIGINAL LOWLAND

1500

1000

500





EXPLANATORY NOTES

1931 CROSS-SECTIONS – From a recent survey showing present elevation of land. Note sunken condition of the area between levees as compared to the normal height of accretions on the east and west sides.

Traces still remain of the original sand ridge or barrier on the San Pablo Bay side. The irregular profile of station 2 shows the disturbed condition of the surface due to recent excavation of sand at that point.

Area south of station 24 has been used for deposit of spoil from channel dredging. A cross-section at station 48 is representative for all of the sections in this area. Note that fill covers largely original tide lands.

1917 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-304 (C-304) of June 1917. Plotted within the limits of the original shore lines of 1852. Area between levees lies at a higher elevation than in 1931. Trace of sand ridge is longer and more prominent than in 1931.

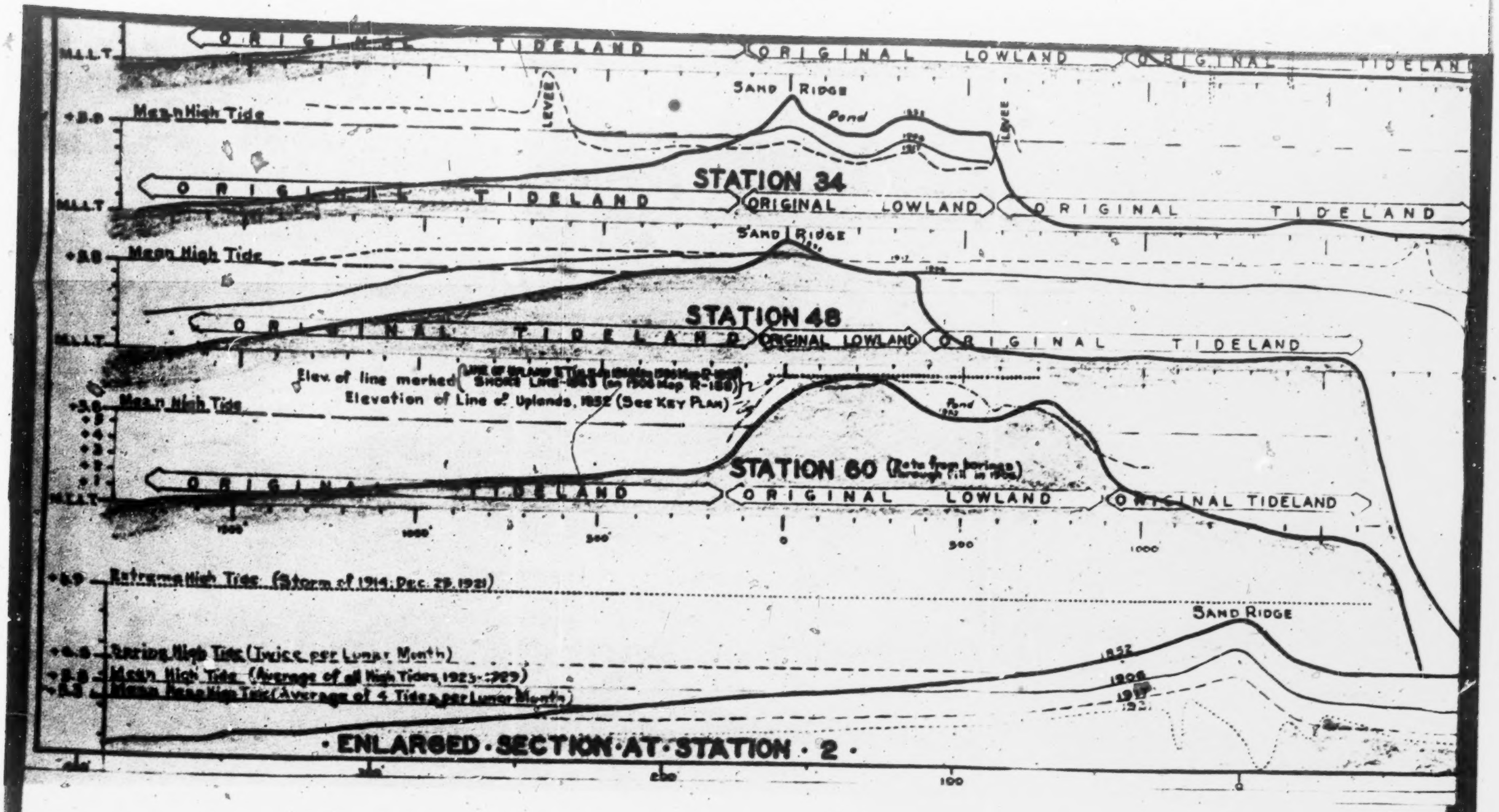
Station 48 shows an abnormal elevation due to artificial fill.

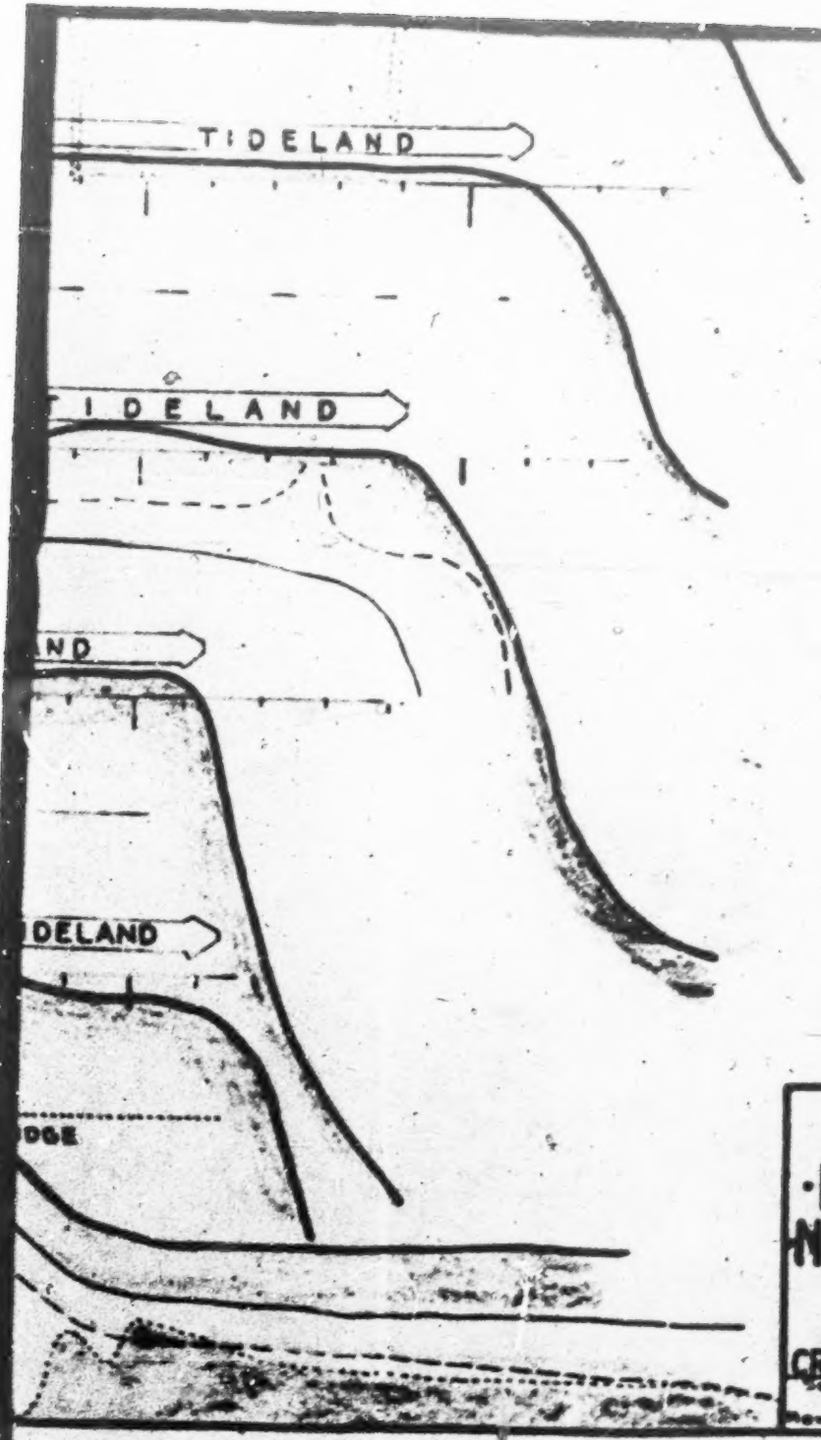
1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-188 (C-188) of Feb. 1906. Plotted within the limits of the original shore lines of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1931.

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1852 U.S.C. & G.S. Chart and from the replotting of the original notes (Exhibits L-20 and L-21)

(b) The locations of sloughs, ponds and drainage


ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
+8.0 Mean High Tide
LEVEE
SAND RIDGE
Pond
LEVEE
STATION 34
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
SAND RIDGE
+8.8 Mean High Tide
STATION 48
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
Elev. of line marked
Elevation of Line of Uplands, 1852 (See KEY PLAN)
+8.6 Mean High Tide
Pond
STATION 60 (Data from borings)
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
1000
500
0
500
1000
+8.9 Extreme High Tide (Storm of 1914, Dec. 29, 1921)
SAND RIDGE
+6.6 Spring High Tide (Twice per Lunar Month)
+5.8 Mean High Tide (Average of all High Tides, 1925-1929)
+5.3 Mean Neap High Tide (Average of 4 Tides per Lunar Month)
1852
1906
1917
1921
· ENLARGED · SECTION · AT · STATION · 2 ·
200
100
0



to artificial fill. Station 48 shows an abnormal elevation due

1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map # 188 (C-188) of Feb 1906. Plotted with the limits of the original shore lines of 1852. The 1852 between the levees is found to have been higher in 1906 than in either 1917 or 1931

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1856 U.S.C.&G.S. Chart and from the replotting of the original notes (Exhibits L-20 and L-21)

(b) The locations of sloughs, ponds and drainage features are taken from the 1851-8 surveys of U.S.C.&G.S. The 1906 cross-sections, although lower in elevation, were found to retain corresponding locations of sloughs, ponds and drainage features.

Therefore, the 1852 profile has been drawn parallel to the 1906 profile

(c) It will be noted on every section that the unreclaimed low and tule land outside the levees builds up to an elevation at least (1/4) of a foot on the west or the San Pablo side and .67 of a foot above mean high waters on the Napa River or east side. The latter elevation of .67 of a foot was also noted by the Coast Board of 1852 with respect to the tule land east of the highlands. The crest of the sand ridge or barrier has been averaged in the 1852 cross-sections at an elevation of .67 of a foot above mean or ordinary high water and represents the lowest possible elevation of the low and tule land east of the barrier or ridge.

(d) A minimum elevation for the crest of the sand ridge has been derived from the least disturbed cross-section shown on the earliest contour survey (Feb. 1906) defendants exhibit No 4). The use of this elevation on all cross-sections restores the original relation of the sand ridge to the shore line at mean high water.

RE - STATION 48:

Cross Section thru neck of land in 1852

Elevation of [illegible] or UPLANDS 1852 [illegible]

Elevation of CREST [illegible]

[illegible] - ELEVATION OF STATION 48:

1. Portion including sand ridge redrawn to a larger scale to make clearer the relation of various Tidal Levels (and frequency) to the Crest.

2. Irregularity at Sand Ridge in 1931 due to recent sand excavation.

PLATE IV

PHYSICAL CHANGES IN THE LOWLANDS NORTH OF THE UPLANDS OF MARE ISLAND FROM 1852 TO 1931

CROSS SECTIONS TAKEN FROM ACTUAL SURVEYS IN 1852-1906-1917-1931

Surveyed and Plotted by U.S.C.&G.S. Under Direction of [illegible]

Navy Yard, Mare Island, Calif. [illegible] Bureau of Yards & Docks

150

We offer in evidence the corrected report of Spanish and American Grants in California, complete to February 25, 1886, prepared by the Surveyor General, published as a supplement to his official report of 1883-84.

(The document was received in evidence and marked "Plaintiff's Exhibit O".)

PLAINTIFF'S EXHIBIT O.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

Corrected Report
of
SPANISH AND MEXICAN GRANTS
IN CALIFORNIA,
Complete to February 25, 1886.
Prepared by
State Surveyor-General,
Published as Supplement to Official Report
of 1883-84.
[Seal]
Sacramento:
State Office, James J. Ayers, Supt. State Printing.
1886.

5
3
1

No. on Gen'l L. C. Map	NAME OF GRANT	Confirmee	
58	Guenoc	Ritchie & Forbes	2
66	Guilicos, Los	Juan Wilson	1
519	Guajome	A. Solma et al.	
462	Habra, La	Andres Pico et al.	
19	Honcut	Chas. Covillaud et al.	3
340	Huasna	I. J. Sparks	2
182	Huecos, Los	Roland & Hornsby	3
315	Huer-h-uero	F. Branch	1
421	Huerta de Cuati	V. Reid	
330	Huerta de Romualdo or El Chorro	Juan Wilson	
72	Huichica	J. P. Leese	1
404	Island of Santa Cruz	Andres Castillero	5
527	Island of San Diego	Peachy & Aspinwall	
470	Island of Santa Catalina	J. M. Covarrubias	4
405	Island of Santa Rosa	M. C. de Jones et al.	6
11	Jacinto	Wm. M. McKee	3
531	Jamacha	A. Lorenzana	
541	Jamul	Heirs of H. S. Burton	
356	Jesus Maria	L. P. Burton et al.	4
22	Jimeno	Larkin & Missroon	4
21	Johnson Rancho	Wm. Johnson	2
80	Jota, La	Geo. C. Yount	
113	Juntas, Las	Heirs of Wm. Welch	13
241	Juristac	J. L. Sargent et al.	
483	Jurupa, part of	A. Stearns	3
482	Jurupa, part of	L. Rubideau	
69	Lac	J. P. Leese	
360	Laguna, La	O. Gutierrez	4
495	Laguna, La	A. Stearns	1
332	Laguna	Bishop J. S. Alemany	
217	Laguna de las Calabazas	F. Hernandez et al.	
163	Laguna de la Merced	J. de Haro et al.	
123	Laguna de los Palos Colorados	J. Moraga et al.	1
30	Laguna de San Antonio	B. Bojorquez	2
301	Laguna de Tache	M. Castro	4
276	Laguna Seca	C. M. de Munras	
196	Laguna Seca	L. C. Bull et al.	1
16	Larkin's Children's Ranch	F. Larkin et al.	4
289	Laureles, Los	J. M. & J. de M. Boronda	6
285	Laureles, Los	L. Ransom	
327	Liebre, La	J. M. Flores	4
266	Llano de Buena Vista	D. Spence	
12	Llano Seco	C. J. Brenham et al.	1
64	Llano de Santa Rosa	J. Carrillo	1
230	Llano del Tequesquite	V. Sanchez et al.	1
81	Locoallomi	Heirs of Julian Pope, dec'd	

SPANISH OR MEXICAN AUTHORITIES—Continued.

rea	Condition of Title	Where Located
220.03	Patented May 22, 1865	Lake
833.86	Patented June 16, 1866	Sonoma
219.41	Patented September 7, 1871	San Diego
698.57	Patented December 4, 1872	Los Angeles
079.96	Patented March 9, 1863	Yuba
152.99	Patented January 23, 1879	San Luis Obispo
950.92	Patented May 13, 1876	Santa Clara
684.95	Patented August 9, 1866	San Luis Obispo
128.26	Patented June 30, 1859	Los Angeles
117.13	Patented April 13, 1871	San Luis Obispo
704.04	Patented August 3, 1859	Sonoma and Napa
760.33	Patented March 21, 1867	Santa Barbara
185.46	Patented June 11, 1869	San Diego
820.43	Patented April 10, 1867	Los Angeles
696.49	Patented October 3, 1871	Santa Barbara
487.52	Patented September 19, 1859	Colusa
881.16	Patented April 11, 1871	San Diego
926.22	Patented October 26, 1876	San Diego
184.93	Patented September 7, 1871	Santa Barbara
854.26	Patented July 18, 1862	Colusa and Yolo
197.31	Patented August 3, 1857	Yuba
453.84	Patented December 18, 1857	Napa
292.82	Patented July 22, 1870	Contra Costa
540.44	Patented November 13, 1871	Santa Clara
819.11	Patented May 23, 1879	San Bernardino
749.99	Patented December 8, 1876	San Bernardino
176.58	Patented August 6, 1872	Sonoma
703.91	Patented May 17, 1867	Santa Barbara
338.84	Patented September 3, 1872	San Diego
157.02	Patented February 4, 1859	San Luis Obispo
304.75	Patented December 8, 1868	Santa Cruz
219.33	Patented September 10, 1872	San Francisco and San Mateo
316.25	Patented August 10, 1878	Contra Costa
903.42	Patented November 21, 1871	Marin and Sonoma
300.62	Patented March 6, 1866	Fresno
179.50	Patented November 24, 1865	Monterey
972.92	Patented November 24, 1865	Santa Clara
164.22	Patented December 18, 1857	Colusa
24.99	Patented August 9, 1866	Monterey
718.23	Patented April 18, 1871	Monterey
799.59	Patented June 21, 1875	Kern and Los Angeles
146.23	Patented January 4, 1860	Monterey
167.17	Patented June 18, 1860	Butte
116.03	Patented November 27, 1865	Sonoma
016.30	Patented December 29, 1871	San Benito
772.79	Patented March 17, 1862	Napa

[illegible]	[illegible]	V. Sanchez et al.	6,659.31	Patented August 3, 1866	San Benito
374	Lompoc	J. & J. A. Carrillo	42,085.44	Patented November 3, 1873	Santa Barbara
427	Los Angeles City Lands	City of Los Angeles	17,172.37	Pat'd Aug. 4, '75 and Aug. 9, '66	Los Angeles
.....	Los Angeles County, lot near San Pedro in	Temple & Alexander	1,771.77	Before Surveyor-General	Los Angeles
60	Mallacomes or Moristal	Cook & Ingalls	2,559.94	Patented February 18, 1859	Sonoma
61	Mallacomes or Moristal y Plan de Agua Caliente, part of	J. S. Berreyesa	17,742.72	Patented July 10, 1873	Sonoma and Napa
.....	Mare Island	G. W. P. Bissell et al.	5,527.22	Final decree not entered	Solano
104	Mariposas, Las	J. C. Fremont	44,386.83	Patented February 19, 1856	Mariposa
111	Medanos, Los	J. D. Stevenson	8,858.83	Patented October 8, 1872	Contra Costa
110	Meganos, Los	Alice Marsh	13,316.00	Patented August 19, 1867	Contra Costa
443	Merced, La	F. P. F. Temple et al.	2,363.75	Patented February 13, 1872	Los Angeles
212	Mesa de Ojo de Agua	T. W. Russell	54.36	Not approved by Com. G. L. O.	Santa Cruz
138	Milpitas	Heirs of J. M. Alviso	4,457.66	Patented June 30, 1871	Santa Clara
307	Milpitas	Ygnacio Pastor	43,280.90	Patented February 18, 1875	Monterey
281	Mission Carmelo	Bishop J. S. Alemany	9.00	Patented October 19, 1859	Monterey
.....	Mission Dolores, lot in	Candelario Valencia	1.78	Patented December 16, 1882	San Francisco
.....	Mission Dolores, lot in	Elizabeth de Zaldo	.45	Sent up for Patent Aug. 26, 1882	San Francisco
161	Mission Dolores, two tracts at	Bishop J. S. Alemany	8.54	Patented March 3, 1858	San Francisco
156	Mission Dolores, lot in	F. DeHaro	2.04	Before Surveyor-General	San Francisco
157	Mission Dolores, lot in	F. DeHaro	.44	Sent up for Patent Aug. 21, 1885	San Francisco
.....	Mission Dolores, lot in	E. & J. R. Valencia	.50	Rejected	San Francisco
160	Mission Dolores, suerte in	Heirs of F. G. Palomares	28.41	Patented April 1, 1870	San Francisco
158	Mission Dolores, suerte in	C. S. de Bernal et al.	5.86	Patented June 13, 1882	San Francisco
372	Mission la Purisima	J. R. Malo	14,735.76	Patented October 12, 1882	Santa Barbara
373	Mission Purisima de la	Bishop J. S. Alemany	14.04	Patented January 24, 1874	Santa Barbara
308	Mission San Antonio	Bishop J. S. Alemany	33.19	Patented May 31, 1862	Monterey
392	Mission San Buenaventura	Bishop J. S. Alemany	36.27	Patented May 23, 1862	Ventura
393	Mission San Buenaventura, lot in	Fernando Tico	28.90	Patented June 9, 1866	Ventura
396	Mission (Ex) San Buenaventura	M. A. R. de Poli	48,822.91	Patented August 24, 1874	Ventura
533	Mission San Diego	Bishop J. S. Alemany	22.21	Patented May 23, 1862	San Diego

We offer in evidence a letter of Commissioner Richards, of the General Land Office, to the Secretary of the Interior, dated September 22, 1905.

(The document was received in evidence, marked "Plaintiff's Exhibit P".)

PLAINTIFF'S EXHIBIT P

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of letter, dated September 22, 1905, is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. PARROTT
Acting Assistant Commissioner of the General Land Office.

1905- 114650.

DEPARTMENT OF THE INTERIOR

General Land Office

Washington, D. C., September 22, 1905.

Address only the

Commissioner of the General Land Office

Subject: Relative to instructing the U. S. Surveyor General to survey lands within the limits of the Mare Island Navy Yard, California.

The Honorable,

The Secretary of the Interior.

Sir:—

I am in receipt, by your reference of September 13, 1905, of a letter dated September 9, 1905, from the Acting Secretary of the Navy, addressed to you, inclosing a letter dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., addressed to the Commandant, Navy Yard, Mare Island, California, recommending that the Secretary of the Interior authorize the U. S. Surveyor General of California to survey certain section lines in Township 3 North, R. 4 W., M.D.M., California, within the limits of the Mare Island Navy Yard, embracing "Tide Land Survey No. 34", and inclosing two blue prints showing in red the approximate location of the land included in said Tide Land Survey No. 34; and a letter from the U. S. Surveyor General of California, dated August 12, 1905, in reply to his communication of August 10, 1905, in which the Surveyor General states that only a small portion "of the public land lines in T. 3 N., R. 4-W, M. D.

M. required for your purpose" have been surveyed by the Government, and that:

> "The section lines referred to in Tide Land Survey No. 34, Solano County, are projections from the lines and corners described in the above mentioned field notes, surveyed, if ever by the surveyor making said Tide Land Survey."

In a letter from Mr. Rousseau, above described, reference is made to a suit instituted by E. H. Sawyer in the case of Sawyer vs. McCalla, see 212 Fed. 765 which is expected to come to trial in November, and which he states is being brought against the United States by Sawyer, "who questions the Government ownership to Tide Land Survey No. 34, Solano County, and accretions" lying to the North of the Steam Engineering Buildings, and comprising about 375 acres, which the U. S. Attorney desires to have definitely established; that said Tide Land Survey No. 34 is located and bounded with reference to certain section lines which it becomes necessary to definitely and accurately establish, and it is of considerable importance to the U. S. Attorney, in his defence of said suit,

> "that the section lines referred to in Tide Land Survey No. 34, Solano County, should be projected as soon as possible",

and referring to said blue prints, he calls attention to three corners of the SE¼ of Sec. 10, T. 3 N., R. 4 W., M.D.M., which, he states, "it is desirable

to have located in the usual manner prescribed by law, by the Department of the Interior".

The Acting Secretary of the Navy, in his said letter dated September 9, 1905, addressed to you, requests that if such action can be appropriately taken, instructions be issued to the Surveyor General directing the survey of the lands, at the earliest date practicable.

In your note of reference, you direct this office to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department in the matter.

I have, therefore, the honor to report that the official plats of Ts. 3 and 4 N., R. 4 W, M.D.M., California, show that Mare Island is unsurveyed, and the records show that said island was claimed before the California Land Commission, established by Act of Congress approved March 3, 1851, (9 Stat., 631), by George W. P. Bissell and Wm. H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, he having received a grant to the land by Juan B. Alvarado, May 20, 1841, and it was confirmed to them, (Bissell and Aspinwall), by the Commission, May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

> "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called 'Isla de la Yegua', or Mare Island, and, being an island, is bounded by the water's edge."

The affirmatory decree of the United States District Court is not in this office, and under date of August 7, 1879, the U. S. Surveyor General, in his letter to this office in reply to letter from this office to him, dated July 25, 1879, stated that:

> "Although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd. day of March, 1857, no such decree can be found".

The Surveyor General at that time also transmitted a plat and field notes of the survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864, (13 Stat., 332), showing the area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of Confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his, (the U. S. Surveyor's General's), office, July 14, 1879, by Bernard F. Hanley, of Washington, D. C., "as attorney for owners".

With reference to the survey as executed by James E. Freeman in 1877, the Surveyor General in his letter dated August 7, 1879, states as follows:

> "I consider the survey incorrect in that, it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained South of a line run across

the island from the vicinity of Station No. 54 to Station No. 138".

Copies of said letter, dated August 7, 1879, from the U. S. Surveyor General and its enclosures, above referred to, were forwarded with letter "E" from this office, addressed to you, dated August 3, 1900, in reply to a letter from the Secretary of the Navy dated July 23, 1900, addressed to you.

The records in this office further show that prior to confirmation of the island to Bissell and Aspinwall, the President by his order, dated November 6, 1850, reserved said island for public purposes, and on February 9, 1853, the Secretary of the Navy addressed a letter to the President, recommending the reservation, as a site for a navy yard and naval depot, of Mare Island, describing the land to be reserved, as follows:

> "The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island and harbors, waters and anchorages connected therewith, and necessary to the use of the same".

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

> "The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate

Department, that the reservations may be legally recorded".

In addition to the foregoing, it is shown that, in eply to a letter from this office dated July 26, 1879, he Secretary of the Navy, under date of August 4, 879, transmitted a copy of deed dated January , 1853, from George W. P. Bissell, Wm. H. Aspinvall, and Mary S. McArthur, to the United States, or the island, in consideration of the sum of 83,491, "to them paid in proportion to their said nterests, respectively", and the land is described in he copy of the deed as follows:

> "All that tract of land and island known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging, (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof".

Attached to this copy of said deed is also a copy f the opinion of the Solicitor of the Navy Depart- nent, dated October 20, 1873, addressed to "Commo.

C. R. P. Rogers, Chief of Bureau &c", in which it is stated as follows:—

> "During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.
>
> The decision of the Board of Commissioners of the U. S., under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now hold."
>
> If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay".

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter; "See letter from the Secretary of the Navy, dated August 4, 1879", and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell,

pinwall and McArthur, which survey was deemed ficient for the purpose of conveying the land.

In view of the foregoing, I am of the opinion at this office has no authority to survey any land the locality described, for the reason that it is not blic land of the United States, the same having en purchased by the United States from the pri-te land claimants aforesaid who derived their le from the Government of Mexico, as stated, and ere is no appropriation available out of which e expense of surveying other than public lands of e United States and reservations or abandoned servations, under the jurisdiction of this office, uld be paid.

If any further survey of the land is desired, I spectfully submit that it should be executed under e direction of the Navy Department under whose risdiction the land now appears to be.

The papers transmitted by you are returned here-th.

Very respectfully,

W. A. RICHARDS

HW. Commissioner.

We offer in evidence the decision of Commis-ner Tallman, of the General Land Office, dated ptember 16, 1914.

(The document was received in evidence, marked Plaintiff's Exhibit Q".)

PLAINTIFF'S EXHIBIT Q.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of decision, dated September 16, 1914, filed under No. 254852, is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. PARROTT
Acting Assistant Commissioner of the General Land Office.

In reply please refer to 254852 "G" LWR

3 Ex.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington

September 16, 1914

Address only the
Commissioner of the General Land Office
: Mare Island. Claimed as
: swamp and overflowed land.

Register and Receiver,
San Francisco, California.

Sirs:

July 29, 1912, the State of California, by its State Surveyor General, applied for the certification to it of "all of the swamp and overflowed lands returned as such on the U. S. plats of T. 3 N., R. 4 W., and T. 4 N., R. 4 W., M. D. M., approved March 4, 1863, as provided by Sec. 4 of an Act of Congress to quiet land titles in California, approved July 23, 1866" (14 Stat., 218), now Secs. 2488 and 2489, U. S. Revised Statutes.

The said application is hereby held for rejection for two reasons: 1. No segregation survey of said swamp and overflowed lands, showing their location and area, has been approved. 2. If they be on Mare Island, that was in private ownership under a Mexican grant since May 20, 1841, and so was not subject to the grant made by the Act of September 28, 1850 (9 Stat., 519).

1. It is unnecessary to show that swamp and overflowed lands must be definitely located, with an

approximation to their area, before they can be patented.

2. Mare Island is unsurveyed. It was claimed before the U. S. Board of Land Commissioners for California, established by Act of Congress approved March 3, 1851 (9 Stat., 631), by George W. P. Bissell and William H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, who had received a grant to the island in its full extent from Governor Juan B. Alvarado, May 20, 1841. It was confirmed to those claimants by the Commission on May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

The place of which confirmation is hereby given, is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and, being an island, is bounded by the water's edge.

August 7, 1879, the then U. S. Surveyor-General for California transmitted to this office a plat and field notes of the Survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864 (13 Stat., 332), showing the area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his office, July 14, 1879,

by Bernard F. Hanley, of Washington, D. C., "as attorney for owners."

November 6, 1850, prior to the confirmation of the island to Bissell and Aspinwall, the President of the United States, by executive order of that date, reserved said island for public purposes.

February 9, 1853, the Secretary of the Navy addressed a letter to the President, recommending the reservation of Mare Island as a site for a navy yard and naval depot, describing the land to be reserved as follows:

The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said island, and harbors, waters and anchorages connected therewith, and necessary to the use of the same.

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservations may be legally recorded.

In addition to the foregoing, it is shown that, in reply to a letter from this office dated July 26, 1879, the Secretary of the Navy, under date of August 4, 1879, transmitted a copy of deed dated January 4, 1853, from George W. P. Bissell, William H. Aspinwill, and Mary S. McArthur, to the United States, for the island, in consideration of the sum of $83,491,

"to them paid in proportion to their said interests, respectively," and the land is described in copy of deed as follows:

All that tract of land and island known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the tule or low land and marsh belonging to the same, or which has ever been reported or claimed to belong to the same, and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Attached to this copy of said deed is also a copy of the opinion of the Solicitor of the Navy Department, dated October 20, 1873, addressed to "Commo. C. R. P. Rogers, Chief of Bureau, etc.," in which it is stated as follows:

During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.

The decision of the Board of Commissioners of the U. S. under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now holds.

If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay.

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter: "See letter from the Secretary of the Navy, dated August 4, 1879," and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell, Aspinwall and McArthur, which survey was deemed sufficient for the purpose of conveying the land.

The District Court, for the Northern District of California, Second Division, in the case of Sawyer vs. Osterhaus, on February 7, 1914 (212 Fed., 765), decided that, notwithstanding a grant to a State of public lands under a generic description, but dependent upon ascertainment and definition by survey or patent to pass the legal title, until such title is vested in the State, the United States retains full and complete power to devote any portion of such lands to any necessary public purpose. The decision further stated that in the opinion of the U. S. Supreme Court in the case of Wright vs. Roseberry (121 U. S., 488), which was followed in the case of San Francisco Savings Union vs. Irwin (136

U. S., 578), there was some language tending to sustain the theory of law that the swamp-land Act was an absolute grant in praesenti, vesting at once in the State and subjecting to its immediate disposition the legal title to all the lands falling within the class therein described, dependent only on their identification as such without the necessity of patent from the United States to the State, and that this identification, if not had through the Secretary of the Interior and the formal issuance of patent, might be shown, by one holding evidence of title under the State, through the introduction of parole evidence establishing the character of the land as swamp and overflowed at the date of the taking effect of the Act; and that, upon that fact being shown, a perfect legal title is made out, upon which ejectment may be maintained.

The said district court, however, held that that theory had been overruled by the United States Supreme Court itself, saying:

It must now be regarded as definitely settled by the later cases from the Supreme Court that, while concededly the Act was, by its terms, a grant in praesenti, the legal title to the lands granted thereby vests in the State only upon definite identification of the lands to which it attached in the manner provided in the Act, and that, until the ascertainment of that fact and issuance of patent, the legal title remains in the Government and that of the State is merely inchoate.

To sustain this ruling the court cited the cases of Rogers' Locomotive Works vs. Emigrant Co. (164

U. S., 568); Michigan Land etc. vs. Rust (168 U. S., 589); Brown vs. Hitchcock (173 U. S., 476); United States vs. Chicago etc. Railway Co. (218 U. S., 242); McCormick vs. Hayes (159 U. S., 338); and Chapman & Dewey Lumber Co. vs. St. Francis Levee District (232 U. S., 186).

Proceeding upon this *base*, the court further ruled that the President has ample power to reserve and set aside any part of the public domain, whatever its character, for a purpose such as that here involved, which is regarded as a paramount use, and that such reservation, having been made, deprived the State of its right under the swamp-land grant, whether or not Congress makes provisions to indemnify it for the loss.

The lands for which the State now applies, being a part of the tule lands of Mare Island, are covered by the President's orders of reservations dated November 6, 1850, and February 11, 1853.

Whether the view of the law announced in the Osterhaus case be or be not correct, this office finds ample justification for its refusal to recognize the claim of the State to these lands in the facts pertaining to the confirmed Mexican grant to Victor Castro and its subsequent confirmation to his vendees, Bissell and Aspinwall, and in those other facts showing that these lands have never been appropriately identified as swamp land by any approved plat of survey, whether under the Act of Congress of July 23, 1866, or under the law as it existed prior to that date.

As the whole of the island was granted to Castro, such a description would include the lowland or the tule and marsh, as well as the high or uplands.

It is more or less certain that tules or marshes are not any the less land because they happen to be sometimes flooded or at all times wholly or partially covered to some slight extent by water. This is the effect of those decisions of the Supreme Court which hold that a meander line marking the inner border of a marsh does not necessarily make water of all that lies beyond that line, and that purchasers of lots bordering on such meander line do not acquire title to marsh lands lying beyond and outside of it which have been ignorantly or intentionally excluded from survey. (San Francisco City and County vs. Le Roy, 138 U. S., 656; Niles vs. Cedar Point Club, 175 U. S., 300; Gauthier vs. Morrison, 232 U. S., 452).

If these lands are merely swamp lands, then they constituted a part of the island as it existed at the date of the Mexican grant, and by virtue of that grant became the property of the grantee, Victor Castro; on the other hand, if they are and always have been tide lands, subject to the overflow of ordinary high tide, the claim of the State thereto would depend, not on the swamp grant of September 28, 1850, but on its sovereign rights as a State to lands under its navigable waters, with the establishment of title to which this office has no duty to perform and no jurisdiction to exercise.

Allow the State 30 days from notice within which to appeal to the Secretary of the Interior from this

decision. Advise it, moreover, that unless it appeals within the time allowed, its application, which, as stated above, is hereby held for rejection, will be rejected without further notice to it.

Very respectfully,

[Illegible] TALLMAN,
Commissioner.

Board of Law Review
By W. B. Pugh

We offer in evidence the letter of the Secretary of the Navy to the Secretary of the Interior, bearing date, February 12, 1905.

(The document was received in evidence and marked "Plaintiff's Exhibit R".)

PLAINTIFF'S EXHIBIT R.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES OF AMERICA
Navy Department

I HEREBY CERTIFY that the annexed copy of letter from the Secretary of the Navy to the Secretary of the Interior dated February 12, 1925, is a true and literal exemplification of the record on file in this Department.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the

City of Washington, this 14th day of July in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. ADAMS,
Secretary.

Office of the Secretary.
File
11458-38:24 U

DEPARTMENT OF THE NAVY
Washington
12 February 1925.

Honorable Hubert Work,
Secretary of the Interior,
Washington, D. C.

Sir:

Receipt is acknowledged of your letter of January 10, 1925, enclosing a copy of your decision of even date holding that the tract of land known as Survey No. 34 now occupied as a part of the Mare Island Naval Reservation in California was at the date of the passage of the Swamp and Overflowed Land Act of September 28, 1850 (9 Stat. 520) swamp in character, but reserving decision upon the question as to whether said swamp lands should be patented to the State of California for a period of thirty days in order to afford this Department an opportunity to show cause, if any, why it should not be so patented to the State of California.

In this connection I have the honor to submit for your consideration the following:

Under the Treaty of Guadalupe Hidalgo in 1848, the Mexican Government granted to the United States all the land in the then State of California "not heretofore granted in private ownership". California was admitted into the Union as a State on September 9, 1850.

The Swamp Land Act of September 28, 1850, above referred to makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the swamp lands within the public domain, transmit same to the Governors of the several states concerned, and at the request of a Governor of a state containing such swamp lands cause a patent to be issued to said state therefor upon which patent the fee simple title of said swamp lands vests in said state, subject to the disposal of the Legislature thereof.

On December 2, 1851, in his second annual message to Congress, President Fillmore recommended the establishment of a Navy Yard in the Bay of San Francisco, California. Pursuant to said recommendation appropriation was made in Section 3 of the Naval Appropriation Act approved August 31, 1852 (10 Stat., 104), for the establishment of such Navy Yard and authority was conferred upon the Secretary of the Navy to select a site therefor in the Bay of San Francisco in California or in neighboring waters either by purchase or reservation of public lands.

The Secretary of the Navy thereupon appointed a Board of Location and Survey composed of four naval officers, who after an extended investigation

and survey submitted their report to the Secretary on November 6, 1852, recommending that Mare Island be selected as the site for said Navy Yard. This report and recommendation were duly approved by the Secretary of the Navy.

It appears that the title to Mare Island had on May 20, 1841, been granted by the Mexican Government to one Victor Castro. It was thus in private ownership in 1848 when the foregoing Treaty with Mexico was made and hence did not pass to the United States as public lands. The said grant to Victor Castro declared him to be "the owner of the property of the island named 'Yegua' (The Mare) situated in the vicinity of the Straits of Carquines in the entire extent". (Exhibits #1 and 2.)

The Act of March 3, 1851 (9 Stat. 631), provided for a United States Land Commission for the settlement of land titles in California. The title to Mare Island by mesne conveyances from Castro had in the meantime become vested in William H. Aspinwall, George W. Bissell and Mary S. McArthur as tenants in common. Their claim to title to Mare Island was filed before the said Land Commission on August 30, 1852 (Exhibit #3), and after extended hearings was confirmed by said Land Commission on May 8, 1855, in the following language:

> "The place to which confirmation is hereby given is situated in the Bay of San Francisco (San Pablo) and is called the Isla de la Yegua or Mare Island and being an island is bounded by the water's edge." (Exhibits #4, 5 and 6.)

On March 2, 1857, their claim to title was further confirmed by the United States District Court of California, upon appeal from the Land Commission (Exhibit #7). No appeal was taken from this confirmation thus making the proceedings final and conclusive.

On January 4, 1853, George W. Bissell, William H. Aspinwall and Mary S. McArthur, executed a deed conveying to the United States for a consideration of $83,491.00 all that tract of land and island known as Mare Island in the Bay of San Pablo "including all the tule or low land and marsh belonging to the same or which had ever been reputed or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments, and appurtenances thereunto belonging". This deed is duly recorded among the land records of California (Exhibit #8).

On February 2, 1853, the Secretary of the Navy transmitted the foregoing deed and other papers in the case to the Attorney General for his opinion on the title to be acquired by the United States thereby (Exhibit #9).

Attorney General Crittenden replied that it appeared that Mare Island is public domain of the United States unless the adverse claims derived from Victor Castro under the grant from the Mexican Government are finally confirmed by the United States Land Commission (Exhibit #10).

On February 9, 1853, the Secretary of the Navy advised the President of his selection of Mare

Island as the site for the Navy Yard and Depot and stated that an investigation of title has *lead* to some doubt whether the Government does not already possess the paramount right to the occupation and use of this island and that his own opinion is that whether the title shall be found to exist in the United States or not it is proper that the Government should reserve the land for public use and thus assert a title which will at least serve to strengthen any other which may ultimately be purchased. Said letter further requested the President, if he should concur in the propriety of making the reservation, to give the necessary orders to that end and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island, etc., the harbors, waters and anchorages connected therewith and necessary to the use of the same be reserved to the United States for public uses (Exhibit #11).

On February 11, 1853, the President endorsed on said papers the following:

> "The reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate Department that the resolution may be properly and legally recorded." (Exhibit #12.)

On February 12, 1853, the Secretary of the Navy advised the Secretary of the Interior of the Presi-

dent's action and requested that the necessary order and notice be given to effect the reservation thus made. (Exhibit #13.)

On April 2, 1853, the Secretary of the Navy requested the Attorney General's opinion as to whether under the provisions of the Act of March 3, 1853, the funds appropriated therein may legally be expended for certain objects of construction at Mare Island. This Act appropriated the sum of $100,000 for such purpose with the proviso "that before this sum shall be expended, the Attorney General of the United States shall decide that the United States have good title to the land upon which buildings are to be erected." (Exhibit #14.)

Attorney General Cushing in his reply of the same date stated:

> "I recommend therefor as an indispensable prerequisite to any legal expenditure of public money on Mare Island,—
>
> "First, that due investigation be had, through the District Attorney for the Northern District of California, or otherwise, into the claim of Henry Sanford, and any other ground of individual claim of date subsequent to the conquest.
>
> "Secondly, that the State of California be invited to relinquish to the United States whatever claim, if any, she may have, to the shores or the overflowed land on Mare Island." (Exhibit #15.)

The said claim of Henry Sanford was duly disposed of and on October 3, 1853, the Secretary of the Navy transmitted a copy of the Attorney Gen-

eral's opinion to the Governor of the State of California and requested that the necessary action be taken to have the State Legislature authorize the cession of lands as indicated by the Attorney General. (Exhibit #16.)

On May 11, 1854, the Legislature of the State of California passed an act declaring its consent to the purchase by the United States of Mare Island and to relinquish the title and interest of the State in overflowed beach or swamp lands on the eastern shore of said island from the southern point thereof to a parallel intersecting the northern point of the highlands, etc. (Exhibit #17.) The area of this cession by the State of California was limited to the area for which development plans for naval purposes at that time had been prepared and submitted and has no decisive bearing upon the title to the remaining area of Mare Island than claimed by the United States.

A further cession was made by the act of March 9, 1897, (Cal. Stat. 1897, page 74), of all the right and title of the State of California in and to the lands extending from highwater mark out to 300 yards beyond low-water mark, lying adjacent and contiguous to any island, the title to which is in the United States or which island is reserved by the United States for any military or naval purpose or for defense. (Exhibit #18.)

On October 20, 1873, the Solicitor and Naval Judge Advocate General rendered a decision holding that the Mare Island papers show a good title in the United States to the whole of Mare Island [illegible] is final and conclusive as to the title of

Bissell, et al, under whom the United States now hold. (Exhibit #19.)

The extent of the area of Mare Island on January 4, 1853, when it was acquired by the United States, seems to have been fully explained by the Board of Location and Survey in its report which as heretofore stated was submitted to the Secretary of the Navy on November 6, 1852. A most diligent search has failed to locate this report. A supplemental report of the Board, however, dated December 13, 1852, in response to the Secretary of the Navy's request of even date, contains the following information on this point:

> "The island, including the tule opposite Vallejo, contains about 900 acres, in addition to a large tract of tule extending towards Napa and Sonoma". (Exhibits #20 and 21).

This shows that at that time Mare Island included the tule opposite Vallejo, and also the large tract of tule extending towards Napa and Sonoma.

That this tule or marsh land was an integral part of Mare Island is conclusively shown by the accompanying charts prepared by Commander Ringgold, U. S. Navy, and Lieutenant Simon F. Blunt, U. S. Navy, in 1850. (Exhibits #22 and 23.) These charts give the soundings of Napa Creek and the high water mark surrounding the island, clearly establishing the fact that the tule land was at that time all above high-water and an integral part of Mare Island. Exhibits #24 and 25, submitted herewith, accompanied the Board's report in 1852 and are the only charts accompanying said report which can

now be located. These latter exhibits appear to have been based on Exhibits #22 and 23, but they only show the highlands of Mare Island which at that time were considered for the development plans for the Navy Yard and they eliminate the tule lands intended to be used for target practice and other naval uses. They are, therefore, not indicative of the entire tract acquired by the United States under the foregoing deed of January 4, 1853. There are also submitted herewith Exhibits #26 and 27 of surveys made by the United States Coast and Geodetic Survey in 1859 and 1863, respectively, showing conclusively the high-water mark surrounding Mare Island and clearly establishing the fact that the tule lands were physically an integral part of Mare Island. The notes of these surveys are on file in the office of the United States Coast and Geodetic Survey, 205 New Jersey Avenue, S. E., Washington, D. C., to which reference is hereby made.

From the foregoing it seems clear that the grant to Victor Castro of Mare Island "in the entire extent" included all of the tule lands which physically formed an integral part thereof. If it had been intended to eliminate the tule lands from this grant such sweeping language would not have been used. The words "in the entire extent" clearly indicate that it was intended to grant all lands which in any way were connected with and formed part of Mare Island.

In the case of Sawyer v. Osterhaus (212 Fed. Rep., 765), the boundaries of Mare Island were aptly defined as follows:

"* * * Its southerly projection resting in San Pablo Bay consists of a compact body of high land having a general resemblance to the low hill or rolling land found on the adjacent mainland from which higher part or head there extends to the northwest a low narrow neck or strip, connecting it with a much larger body of low, swampy land, spreading out fan-like for several miles in the same general direction. This body of land as thus described was bounded by San Pablo Bay on the south and west; by Mare Island Straits and Napa Bay on the east; and Sonoma Creek on the north, all navigable."

The description given in the confirmation of title by the Land Commission and by the United States District Court of California as "being an island is bounded by the water's edge" must have referred to the navigable waters named in the description given in the Sawyer case. No other construction seems logical in view of the foregoing exhibits showing the high-water mark of Mare Island.

The Navy Department, therefore, maintains that under the foregoing deed of January 4, 1853, it acquired all of Mare Island extending from San Pablo Bay on the south and west to Mare Island Straits and Napa Bay on the east and Sonoma Creek on the north as confirmed by the Land Commission and the United States District Court of California and as granted to Victor Castro by the Mexican Government. This being true, it follows that Mare Island as thus described, did not pass to the United

T. 4 N. R. 5 W.

T. 4 N., R. 4 W.

PLAT

of

ISLA DE LA YEGUA OR MARE ISLAND

Finally confirmed to

George W. Bissell and William T. Aspinwall

Surveyed under instructions from the

U.S. SURVEYOR GEN'L

by

James E. Freeman, dep. sur.

July 1877

Containing 5227 $\frac{82}{100}$ Acres

Scale 4 Inches to 1 Mile

Var. 16° E.

Hiuchica Slough

Yard

Slough

Mare

BAY OF SAN

T. 3 N., R. 4 W.

Boundaries T. 3 N., R. 5 W

No.	Course	Dist.	No.	Course	Dist.	No.	Course	Dist.	No.	Course	Dist.
1	S. 60° E.	11.00	17	N. 30° W.	5.00	33	S. 60° E.	11.00	49	N. 30° W.	9.00
2	S. 30° E.	16.00	18	N. 60° W.	4.00	34	N. 30° E.	8.00	50	N. 60° W.	6.00
3	S. 60° E.	3.00	19	N. 30° E.	2.00	35	S. 60° E.	14.00	51	S. 30° W.	12.75
4	S. 30° E.	3.00	20	N. 60° W.	2.00	36	S. 30° E.	8.00	52	N. 60° W.	12.50
5	S. 60° E.	7.00	21	N. 30° E.	4.00	37	N. 60° E.	4.00	53	N. 30° E.	3.00
6	S. 30° E.	3.00	22	N. 60° W.	4.00	38	S. 30° E.	4.00	54	N. 60° W.	5.00
7	S. 60° E.	3.00	23	N. 30° E.	4.00	39	S. 60° E.	4.00	55	S. 30° W.	9.87
8	S. 30° E.	3.00	24	N. 60° W.	3.00	40	S. 30° E.	4.00	56	N. 60° W.	8.50
9	S. 60° E.	1.00	25	N. 30° E.	2.00	41	S. 60° E.	2.00	57	S. 30° W.	30.13
10	S. 30° E.	1.00	26	N. 60° W.	4.00	42	S. 30° E.	2.00	58	S. 60° W.	9.00
11	S. 60° E.	3.00	27	N. 30° E.	4.00	43	S. 60° E.	2.00	59	S. 30° W.	23.50
12	S. 30° E.	1.00	28	N. 60° W.	4.00	44	S. 30° E.	2.00	60	[illegible]	[illegible]
13	S. 60° E.	3.00	29	N. 30° E.	4.00	45	S. 60° E.	2.00	61	S. 77° W.	10.11
14	S. 30° E.	3.00	30	N. 60° W.	4.00	46	S. 30° E.	2.00	62	N. 30° E.	17.00
15	S. 60° E.	3.00	31	N. 30° E.	4.00	47	S. 60° E.	2.00	63	N. 60° W.	30.00
16	S. 30° E.	3.00	32	N. 60° W.	4.00	48	S. 30° E.	2.00	64	S. 30° W.	11.92
17	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	65	S. 73° E.	6.07
18	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	66	S. 0° E.	21.00
19	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	67	S. 60° W.	22.36
20	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	68	S. 30° W.	20.00
21	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	69	N. 60° W.	15.00
22	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	70	S. 30° W.	17.00
23	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	71	S. 60° E.	[illegible]
24	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	72	S. 30° W.	23.00
25	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	73	N. 60° W.	8.00
26	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	74	S. 30° W.	6.00
27	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	75	S. 60° E.	11.00
28	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	76	S. 30° W.	10.00
29	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	77	S. 60° E.	11.00
30	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	78	S. 30° W.	10.00
31	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	79	S. 60° E.	11.00
32	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	80	S. 30° W.	10.00

I hereby certify that in conformity with the provisions of the Act of Congress approved July 1st 1864, this survey and plat were advertised in the "Vallejo Evening Chronicle" published in the County of Solano, for four weeks, the date of the first publication thereof being the 11th of October 1877: also in the "Alta California" published in the City and County of

2-1

PLAINTIFF'S EXHIBIT 8.

[Endorsed]: Filed Aug. 11, 1931. United States District Court. Filed Jun. 18, 1934. United States Circuit Court of Appeals.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.

4W.

PLAT

of

ISLA DE LA YEGUA OR MARE ISLAND

Finally confirmed to

George W. Bissell and William H. Aspinwall

Surveyed under instructions from the

U.S. SURVEYOR GEN'L

by

James E. Freeman, dep sur.

July 1877

Containing 5227 100 Acres

Scale 4 Chs. to 1 inch

Var. 16° E.

N. 11. 4 W.

Mare Island

Navy Yard

Ferry Landing

Ferry

Steam

States as public lands under the Treaty of Guadalupe Hidalgo because it had theretofore been granted in private ownership. It further follows that it did not form a part of the public domain remaining unsold on September 28, 1850, and is therefore not subject to be patented to the State of California under the terms of the Swamp Land Act of that date. The executive order of the President dated February 11, 1853, as above stated, was issued only as a precaution to reserve said lands in the event that the claim of the successors of Castro was not confirmed by the Land Commission. Said claim, however, having been confirmed, the executive order was of no effect.

Respectfully,
CURTIS D. WILBUR
Secretary of the Navy.

We offer in evidence the certified field notes and report of James E. Freeman, United States Deputy Surveyor, made in 1877, con- [247] taining instructions, copy of the minutes of the District Court, copy of the decree of the Land Board, copy of Certificate of Publication of Survey, copy of field notes, protest by B. T. Hanley to United States Surveyor General, protest by B. T. Hanley to the Commissioner of the General Land Office, copy of the Darlington Survey of 1855, and United States Surveyor General Wagner's letter of August 7, 1879.

(The documents were received in evidence, marked "Plaintiff's Exhibit S".)

County of Solano, for four weeks, the date of the first publication thereof being the 11th of October 1879: also in the "Alta California" published in the City and County of San Francisco, for four weeks, the date of the first publication thereof being the 11th of October 1879. This plat remained in this Office, subject to inspection, during thirty days from the date of the first publication

U. S. Surveyor Generals Office
San Francisco, California
August 6th 1879

Thos Wagner
U. S. Surv. Gen'l Cal

I hereby certify that the foregoing is a full, true and correct copy of the original plat of the same appears of record and on file in this Office.

U. S. Surveyor Generals Office
San Francisco, Cal. Aug 6th 1879.

Thos Wagner
U. S. Surv. Gen'l Cal

Straits
Sec 24
Sec 19
Sec 25
Sec 30
PABLO

PLAINTIFF'S EXHIBIT S.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

U. S. Surveyor-General's Office,
San Francisco, Cal.
July 19, 1877.

James E. Freeman,
U. S. Deputy Surveyor.

Sir,—

Whereas, it appears by a certified copy of a decree placed on file in this office, that the claim of George W. Bissell and William H. Aspinwall to a tract of land named Isla de la Yegua, or Mare Island, has been finally confirmed by The Commission for ascertaining and settling the Private Land Claims in California, and by the U. S. District Court for the Northern District of Cal.

And Whereas, application has been made by the interested parties, for a survey and location of said claim, I have thought proper to appoint you my Deputy in this special case, for the execution of the survey thereof.

Agreeably to the decree in the matter, the claim herein referred to is confirmed in favor of the said claimants, to the following effect: "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called Isla de la Yegua; or Mare Island, and being an Island is bounded by the water's edge."

Section 7 of the Act of Congress of July 1st, 1864, provides:

> "That it shall be the duty of the Surveyor-General of California, in making Surveys of the Private Land Claims finally confirmed, to follow the Decree of Confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in a compact form. And if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as nearly as practicable, in a compact form."

You will therefore make your Survey in accordance with the requirements of the law, and said Decree of Confirmation.

You will therefore accurately ascertain and properly measure, run and mark the exterior boundaries of the claim, and restrict it to the confirmed quantity.

In all other respects you will comply with the printed instructions of this office, dated April 9th, 1864, a copy of which is herewith inclosed for your information and guidance.

[Seal] H. G. ROLLINS
U. S. Surveyor-Gen'l, California.

Duplicate

U. S. Surveyor General's Office
San Francisco, Cal., Aug. 6, 1879.

A full true and correct copy of the original as the same remains of record and on file "in duplicate" in this office.

Attest: Theo. Wagner,
U. S. Sur. Gen'l

Instructions.
July 19th, 1877
Rancho
Isla de la Yegua, or Mare Island
Jas. E. Freeman,
Dep. Surveyor.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929

I hereby certify that the annexed copies are photographic copies of the papers they purport to

represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.

311 The United States .
vs.
G. W. P. Bissell & W. H. Aspinwall
1855 "Ysla de Yegua, or Mare Island"
October 13 Filed Transcript from U. S. Land Com.; in case No. 307.

1856
Feby. 1 Filed Notice of Appeal from Atty. Genl.

1857
March 2 " Decree of Confirmation.
April 1 " Order granting Appeal.

I, Southard Hoffman, clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Register entries in the case of the United States vs. G. W. P. Bissell & W. H. Aspinwall No. 311 in said court, and I further certify that on the Minutes of said Court for the 2nd day of March 1857 an entry appears enumerating a number of cases among which is the case of the United States vs. Bissell & Aspinwall to which the

following minute is appended "Decree of confirmation was entered in each of these cases by consent of the United States Dist. Attorney." And after due and diligent search I have been unable to find any Decree of Confirmation on file or of record in said case.

Attest my hand and seal of said District Court, this 4th day of August, A. D. 1879.

SOUTHARD HOFFMAN.
Clerk U. S. Dist. Court Dist. Cal.

[Insignia]

Office of the Surveyor-General,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers which they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

No. 307

George W. Bissell et al.

vs.

The United States.

In this case after hearing the proofs and allegations it is adjudger *of* commission that the claim of the said petitioners here in is valid and it is therefore decreed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and being an Island is bounded by the water's edge.

R. AUG. THOMPSON
S. B. FARWELL
Commissioners.

[Endorsed]: No. 307. G. W. P. Bissell et al. Isla de la Yegua. Decree of confirmation.

Filed in office May 8, 1852 Geo. Fisher Secy.

Recorded in Record of decisions Vol. 2 page 647 Geo. Fisher Secy.

[Insignia]

Office of the Surveyor-General,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

U. S. Surveyor General's Office,
San Francisco, January 18, 1878

I HEREBY CERTIFY, that by virtue of the provisions of the Act of Congress, approved 1st July, 1864, entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California," notice of the plat and survey having been made of the rancho Isla de la Yegua, or Mare Island, finally confirmed to George W. Bissell & Wm. H. Aspinwall, surveyed by Jas. E. Freeman, U. S. Deputy Surveyor, in July 1877, has been advertised in accordance therewith in two newspapers, to wit: the Vallejo Evening Chronicle published in the County of Solano, State of California, being near to where the said land is located: the first publication being

on the 11th day of October 1877, and the last on the 8th day of November 1877; also in the Alta California a newspaper published in the City and County of San Francisco, State aforesaid; the first publication being on the 11th day of October 1877, and the last on the 8th day of November 1877. And that the plat of said survey was retained in this office subject to inspection during all of ninety days, and until the expiration thereof from the date of the first publication.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my seal of office to be affixed in the City of San Francisco, this 18th day of January 1878.

[Seal] J. W. AMES,
U. S. Surveyor General for California.

U. S. Surveyor General's Office.
San Francisco, Cal. Aug. 6, 1879

I hereby certify that the foregoing is a full, true and correct copy of the original record of publication in the case of the survey of Mare Island as the same appears of record and on file in this office.

Attest.
THEO. WAGNER,
U. S. Sur. Gen'l.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 4, 1929.

I hereby certify that the annexed copy of field notes of survey of "Isla de la Yegua" or "Mare Island", is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

FIELD NOTES
OF
The survey of "Isla de la Yegua" or
"Mare Island,"
Situated in Sonoma County,
State of California
Granted by Juan B. Alvarado to
Victor Castro May 20th, 1841.
Finally confirmed to
Geo. W. Bissell & William H. Aspinwall,
by the U. S. District Court, March 2d, 1857.
Surveyed by James E. Freeman.
Date of Contract June 28th, 1876.
Date of Instructions July 19th, 1877.
Survey commenced July 24th, 1877.
Survey completed August 1st, 1877.

PRELIMINARY OATH OF ASSISTANTS.

I, ...do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

.....

Subscribed and sworn to before me, this.....day of.....187.....

.....

U. S. Deputy Surveyor

We, DANIEL SCULLY and N. W. BREW do solemnly swear that we will faithfully execute the duties of Chain Carriers; that we will level the chain upon uneven ground, and plum the tally pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

his
DANIEL X SCULLY
mark
N. W. BREW.

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, Thomas Dixon do solemnly swear that I will well and truly perform the duties of Flagman according to instructions given me, and to the best of my skill and ability.

THOMAS DIXON

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLEY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, John Charlton, do solemnly swear that I will faithfully execute the duties of chain carrier or flagman according to the best of my skill and ability.

JOHN W. C. CHARLTON.

Sworn and subscribed to before me this 25th day of July, 1877.

CHAS. W. RILLEY,
Justice of the Peace in and for Vallejo,
Township—Solano Co., Cala.

In order to connect the survey of Mare Island with a section corner of the Public Land Survey's, I begin at the quarter sec. corner, bet. secs. 13 & 18. Ranges No. 3 & 4 West. Township No. 3 North, Mt. Diablo base & Meridian and run South 120 chains to the cor. of secs. 19, 24, 25 & 30.

Now commencing at the water edge on the Easterly side of Mare Island, West of the Sec. corner set a post 4 x 4 x 40 inches marked S. 24 & 25 bears West 25 links distant standing by a prominent flag pole of the U. S. Coast Survey.

July 24th, 1877.

Thence along the water's edge at ordinary high water mark.

Var. 16° 15' E.

1	S. 40° E.	23.90	The cor. of secs. 19, 24, 25 & 30 on main land brs. N. 46° E.
		31.40	
2	S. 27½° E.	12.70	S. E. cor. of Magazine brs. West 50 lks.
		15.00	
3	S. 40¼° E.	3.50	
4	S. 36½° W.	3.50	
5	S. 69° W.	7.50	
6	S. 16° E.	3.70	
7	S. 13¼° W.	2.50	
8	S. 41° W.	2.60	
9	S. 75° W.	1.60	
10	S. 86½° W.	5.00	

11	S. 30°	W.	4.20	
12	S. 85½°	W.	2.00	
13	S. 62°	W.	8.10	Light House 2 chs. North.
14	N. 54°	W.	40.00	
15	S. 80°	W.	2.30	
16	S. 86½°	W.	3.50	
17	N. 74½°	W.	3.60	
18	N. 66½°	W.	2.70	
19	N. 33°	W.	1.90	
20	N. 87°	W.	1.00	
21	N. 48½°	W.	1.84	
22	N. 47½°	W.	10.50	
23	N. 77°	W.	2.50	
24	S. 55°	W.	2.50	
25	N. 43½°	W.	1.00	
26	N. 31°	W.	29.00	
27	N. 60½°	W.	3.20	
28	S. 77°	W.	2.90	
29	N. 5°	W.	4.50	
30	N. 23½°	W.	4.30	
31	N. 31°	E.	1.20	
32	N. 33½°	W.	4.70	
33	N. 25°	W.	3.30	
34	N. 32½°	W.	10.00	
35	N. 25½°	W.	26.10	S. W. Cor. of Barracks brs. N. 44 E.
				July 25th, 1877.
36	N. 4½°	E.	2.00	
37	N. 24°	W.	5.50	
38	N. 30°	E.	3.30	
39	N. 31½°	E.	2.20	
40	N. 17°	E.	5.40	S. W. cor. of Barracks brs. S. 75° E.
41	N. 31°	W.	6.00	
42	N. 40°	W.	4.00	
43	N. 50½°	W.	3.30	
44	N. 83½°	W.	2.00	
45	N. 16°	W.	2.70	
46	N. 43°	W.	1.90	
47	N. 14°	W.	1.70	
48	N. 72½°	W.	1.40	
49	N. 18½°	W.	5.60	

50	N. 10°	W.	7.00	
51	N. 26½°	W.	7.00	
52	N. 19°	E.	4.20	
53	N. 22°	W.	6.00	To Tide Lands thence along Tide Lands.
			12.00	
54	N. 34°	W.	24.00	
55	N. 40°	W.	44.00	
56	N. 52°	W.	44.00	
57	N. 61°	W.	64.00	
58	N. 64°	W.	36.00	
59	N. 70°	W.	196.00	
60	N. 61°	W.	40.00	
61	N. 62°	W.	15.00	
62	N. 58¼°	W.	25.00	
63	N. 67°	W.	13.50	
64	N. 86¼°	W.	4.00	A fishermans cabin 1 ch. North.
				July 26th, 1877.
65	N. 50½°	W.	7.50	
66	N. 79½°	W.	18.00	
67	N. 55°	W.	5.00	
68	N. 81°	W.	23.00	
69	N. 67½°	W.	10.00	Leaves San Pablo Bay.
			"	To mouth of Sonoma Creek comes from N. W.
70	N. 63¼°	W.	40.00	
71	N. 23¼°	W.	8.00	Point of Land at the confluence of the Huichica Slough & Sonoma Creek brs. N. 50° W. about 10 chs. dist. Thence along Huichica Slough.
72	N. 26¾°	E.	4.50	
73	N. 63½°	E.	11.50	
74	N. 87½°	E.	23.00	
75	N. 87°	E.	41.00	
76	East		11.50	
77	S. 74½°	E.	40.00	
78	S. 85½°	E.	10.70	
79	N. 75¼°	E.	9.50	

80	N. 60½°	E.	18.00	To a point opposite the junction of South or "Navy Yard" Slough with "Middle Napa" Slough, thence up South or Navy Yard Slough.
81	S. 36°	E.	2.30	
82	S. 1½°	W.	7.00	
83	S. 5°	W.	11.70	
84	S. 6½°	E.	7.50	
85	S. 37°	E.	7.00	July 27th, 1877.
86	S. 75½°	E.	4.00	
87	East		6.70	To the Westerly Mouth of Montgomery Slough crs. S. E. 2 chs. wide.
88	N. 41°	E.	4.00	
89	N. 35½°	E.	12.00	
90	N. 22°	E.	12.50	
91	N. 3½°	E.	26.00	
92	N. 10°	W.	22.00	
93	N. 56½°	E.	5.00	
94	S. 65½°	E.	20.00	
95	S. 78°	E.	4.00	
96	N. 87½°	E.	11.00	
97	S. 61°	E.	1.50	
98	S. 52°	E.	4.40	
99	S. 3½°	E.	5.50	
100	S. 15°	W.	10.40	
101	S. 6¼°	W.	8.00	
102	S. 8°	E.	11.00	
103	S. 30°	E.	8.50	To Easterly Mouth of Montgomery cut off or slough crs. S. W.
			9.98	Over same.
104	S. 74½°	E.	20.00	
105	East		21.00	
106	N. 56¼°	E.	12.50	
107	N. 23¼°	E.	8.00	
108	N. 11½°	E.	8.50	
109	N. 63½°	E.	9.00	
110	N. 60½°	E.	6.58	
111	S. 63¾°	E.	13.76	
112	N. 64½°	E.	12.60	

113	N. 82°	E.	3.18	July 28th, 1877.
114	S. 23¾°	E.	2.18	
115	S. 25½°	W.	4.47	
116	S. 61¾°	W.	8.94	
117	S. 35½°	W.	28.13	
118	S. 10¾°	W.	9.60	
119	S. 33°	E.	23.20	
120	S. 15°	E.	16.14	
121	S. 51½°	E.	14.56	
122	S. 77¾°	E.	10.53	
123	N. 75¼°	E.	17.90	
124	N. 43½°	E.	39.50	
125	N. 60½°	E.	11.92	
126	S. 73°	E.	4.97	
127	S. 9°	E.	23.55	Boat cut off or Dutchmans
128	S. 46¾°	E.	23.76	slough 1 ch. wide.
129	S. 65½°	E.	34.00	
130	N. 89°	E.	56.56	Leave Navy Yard or South Slough and enter creek.
131	S. 78½°	E.	17.10	
132	S. 9½°	W.	60.00	
133	S. 4½°	E.	42.70	To South Easterly mouth of Boat Cut off or Dutchmans slough 6 chs. wide co. N. W.
134	S. 13¾°	W.	13.91	
135	S. 16½°	E.	40.50	
136	S. 31½°	E.	23.11	
137	S. 42½°	E.	24.60	
138	East		23.21	To the Northerly cor. of Machine Shop.
			"	Leave Tide Lands.
				July 29th, 1877.
139	S. 40½°	E.	28.50	
140	S. 24½°	E.	8.63	To Ferry Boat Wharf co. N. E. & S. W.
			14.00	To Dry Dock.
			33.15	
141	S. 42°	E.	37.42	
142	S. 38°	E.	33.46	
143	S. 19°	E.	6.45	To the place of beginning
				Containing 5227-22/100 acres

GENERAL DESCRIPTION

With the exception of a narrow strip of land on the Easterly side of the Island, all that portion where the Navy Yard is situated extending Southerly from the Machine shop, is high dry ground rising gradually towards the South.

At the Southerly end of the Island the bluffs appear to be about 200 ft. in height—soil generally first rate.

That portion extending North Westerly from the Machine shop, is tide or swamp land producing tule & other salt marsh grasses.

The "Boat Cut off" known also as "Dutchmans slough" is about 60 lks. wire near its Westerly end —widening out towards the South Easterly end to 8 to 10 chains.

The South or Navy Yard slough varies in width from 6 to 10 chains.

The Northern boundary is entered by numerous small sloughs which ramify this portion of the Island in every direction. Owing to the action of the tides all the sloughs are very broad at their entrance but narrow rapidly as they extend inland. Sailing vessels of Light Draught can pass around Mare Island by way of South or Navy Yard slough.

Several Iron Monuments are erected near the water's edge along the Northern boundary with notices thereon forbidding persons to trespass on the lands, as they are claimed by the U. S. Government.

August 1st, 1877.

JAS. E. FREEMAN

WE DO HEREBY CERTIFY, that we assisted Jas. E. Freeman, U. S. Deputy Surveyor, in surveying the boundary lines of the Rancho Isela de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall, and that said Rancho has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments established according to the laws of the United States, and the instructions of the Surveyor-General.

_____Compassman,

N. W. BREW Chainman,

JOHN W. C. CHARLTON Chainman,

His

DANIEL X SCULLY Axeman,

mark

THOMAS DIXON Flagman.

Subscribed and sworn to before me this 1st day of August, 1877.

CHAS. W. RILLEY,

Justice of Peace

Vallejo—Solano Co., Cala.

I, Jas. E. Freeman, U. S. Deputy Surveyor, do solemnly swear that, in pursuance of instructions from H. G. Rollins, U. S. Surveyor-General for the State of California, bearing date the 19 day of July, 1877, and in strict conformity to the laws of the United States and the said instructions from the Surveyor-General, I have well and faithfully

surveyed the boundary lines of the Rancho Isla de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall and I do further solemnly swear that the foregoing are the true and original field notes of said survey.

JAMES E. FREEMAN,
U. S. Deputy Surveyor.

Subscribed by said Jas. E. Freeman, U. S. Surveyor, and sworn to before me, a U. S. Commr. in and for the County of San Francisco in the State of California, this 29th day of Aug., 1877.

J. A. ROBINSON,
U. S. Commissioner.

U. S. Surveyor General's Office,
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing transcript has been correctly copied from the original field notes as the same remain of record and on file in this office.

Witness my hand and official seal the day and year in this certificate written.

THEO. WAGNER
U. S. Sur. Gen'l.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

Washington, D. C.
July 5, 1879.

To the
Surveyor General of the United States for the
State of California.

Sir:—

It has lately came to the knowledge of the present owners of certain tule or swamp and overflowed land situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the island of Mare Island, (being the same property hereinafter referred to and described herein and in the papers hereto annexed) that the Government of the United States, through you, its proper representative, had lately surveyed said land to the United States, claiming the same as included

in the purchase by it of the said island from George W. Bissell et al in the year 1852.

The particular tule or swamp and overflowed land referred to is that described in the survey made by H. Patten, surveyor of said Solano County on the 11th and 12th of June 1855, (a copy of which is hereto annexed) and in the Letters Patent (copy also annexed), of the State of California to one David N. Darlington, issued under the seal of said State on March 18th, 1857; the title to such swamp and overflowed land having previously become vested in said State under and by virtue of the Act of Congress approved September 28th, 1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the premises, I, Bernard T. Hanley, attorney for the said present owners and acting herein by their direct authority, do solemnly protest against said survey of said property to the United States, (the same being already legally vested in them, the said owners) and against the signing and confirmation thereof; and while hereby entering, in behalf of said owners their said protest, I also, for and in their behalf, respectfully request that if, notwithstanding protest, you should sign said survey and forward same to the General Land Office or other proper office in Washington, you should at the same time, or as soon thereafter as practicable, forward this protest to the same office as well as the copy of Letters Patent and Survey herewith enclosed and referred to.

And, acting as aforesaid, I do further protest against said survey in so far as it includes certain additional tule or swamp and overflowed lands located adjacent to said Mare Island under authority of said Act of Congress and of certain school land warrants of the State of California. As will appear by reference to certificate of location filed in the office of the County Clerk of Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully
BERNARD T. HANLEY
Atty. for Owners.

United States of America—
State of California.

To all to whom these presents shall come, Greeting,

Whereas, under the provisions of an Act of Congress of the United States approved the 28th day of September, A. D. 1850 entitled "An Act to enable the State of Arkansas and other States to reclaim swamp lands within their limits," in which act the manner of selecting and setting apart swamp and overflowed lands, are fully set forth, and whereas, in accordance with the provisions of the Act of Congress, the title of which is above recited, the Legislature of the State of California on the 28th day of April, A. D. 1855, passed an act entitled "An Act to provide for the sale of the swamp and overflowed lands belonging to the State" which Act authorized the location and disposal of a portion of the overflowed lands donated to the State of

California by the Act of Congress the title of which is above recited.

And Whereas it appears by the Certificate of the Secretary of State bearing date the 18th day of March A. D. 1857, that he has been duly notified by the Treasurer of the State of California that David N. Darlinton has paid $164.55 to the Treasurer of Solano County, State of California, in full payment for 164.55 acres of Swamp and overflowed lands situated in said Solano County and described in the county records of said county as follows, to wit: The south fractional half of the southeast quarter of Section No. Ten, the North-East fractional portion of the North-East quarter of Section No. 15, the South-West fractional portion of the South-West quarter of Section No. 14, and the North East fractional portion of the South-West quarter of Section 14, the whole lying between San Pablo and Napa bays in said County of Solano and being in Township Number three north Range four west of Monte Diablo meridian and base and conforming to the U. S. Government survey.

Now therefore all the requirements of the Act of Congress as well as the Act of the State Legislature in relation to swamp and overflowed lands having been fully complied with he the said David N. Darlinton has become entitled to a patent from the State of California for the tract or parcel of swamp or overflowed lands above described; and there is hereby granted by the State of California to the said David N. Darlinton and to his heirs and assigns forever the said described tract or par-

cel of swamp and overflowed lands with the appurtenances; the said David N. Darlington, his heirs and assigns to have and to hold forever the said described tract or parcel of land with all the rights, privileges and appurtenances unto the same belonging or in any way appertaining.

In Testimony Whereof I, J. Neely Johnson, Governor of the State of California have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand at the City of Sacramento this the 18th day of March in the year of Our Lord A. D. 1857.

(Sig'd) J. NEELY JOHNSON

[Seal of State]

Attest

DAVID F. DOUGLASS,
Secretary of State.

Copy

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14—and Fractional N. E. qr. of Sec. 15 of Township 3, N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 60°, 270.00 chains. Thence run W. 50.00 chains; From this point the target on the Island bore S. 67°, 20′ W.; thence run S. 40.00 chains, from which point target bore W.; thence run W. 20.60 chains to shore of Napa

Bay—distance from this point to target 73.75 chains.

Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo Bay 39.20 chains; thence N. 52° W. along the same shore 26.50 chains; thence N. 56° W. 7.00 chains; thence N. 22.55 chains; thence E. 21.53 chains to Napa Bay; thence South-Eastwardly along the shore of Napa Bay to the upland and thence with the sinuosities of the upland to the place of beginning. Which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

(Sigd) H. PATTON,
County Surveyor
Solano County.

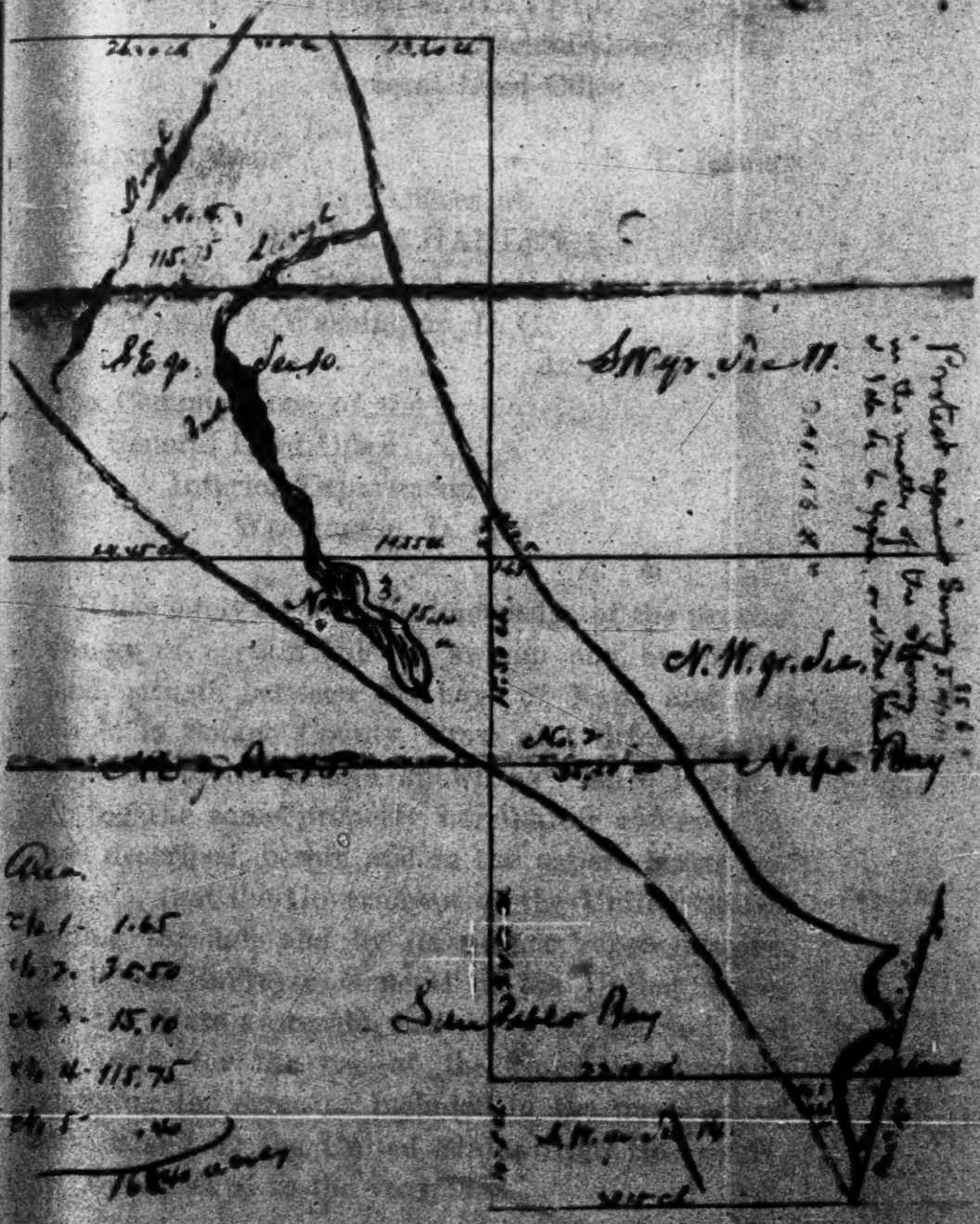
United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 5, 1929.

I hereby certify that the annexed copy of protest, dated July 16, 1879, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this

F-6



office to be affixed, at the city of Washington, on the day and year above written.

THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

Warren C. Stone B. T. Hanley

Law Offices of
STONE & HANLEY,
No. 319 Four-and-a-half Street.
Washington, D. C.,

July 16th, 1879

The Commissioner of the
General Land Office
Interior Department,
Washington, D. C.

Sir:

It has lately come to the knowledge of the present owners of certain tule or swamp and overflowed land, situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the Island known as "Mare Island," (being the same property hereinafter referred to, and described, herein and in the papers hereto annexed), that the Government of the United States, acting through and by its proper representative, towit the Surveyor General of the United States for the State aforesaid, had surveyed the said land to itself, for the use of the Navy Department, claiming the same as included in the purchase of said island by the United States from George W. P. Bissell et al in the year 1853.

The particular tule or swamp and overflowed land referred to is that described in the survey made by H. Patton, Surveyor of said Solano County on the 11th and 12th days of June A. D. 1855, (a copy of which survey is hereto annexed), and in the Letters Patent of the State of California, issued under the seal of said State March 18th A. D. 1857, (copy also annexed), the title to such swamp and overflowed land having previously become vested in the State under and by virtue of the Act of Congress approved September 28th, 1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the foregoing, I, as attorney for the said present owners and acting herein by their direct authority, do formally protest against said survey and the consideration or confirmation thereof by you or other proper officer of any Department or Bureau of the Government of the United States, and in protesting request that if testimony be necessary the Commission to take the same may issue at the earliest practicable date.

And acting as aforesaid, I do further protest against said survey in so far as the same includes other tule land, located in like manner adjacent to Mare Island, aforesaid, under authority of an Act of Congress passed May 3, 1852, and of certain school land warrants of the State of California, numbered 151 and 274, reference being had to the certificate of location filed in the office of the County Clerk of said Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully,

B. T. HANLEY

Atty. for the Owners.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

[Copy]

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14 and Fractional N. E. qr. of Sec. 15 of Township 3 N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 16°, 270.00 chains; thence run W. 50.00 chains; from this point the target on the Island bore S. 67° 20′ W.; thence run S. 40.00 chains, from which point target bore W. thence run W. 20.60 chains to shore of Napa bay; distance from this point to target 73.75 chains.

Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo bay 39.20 chains—thence N. 52° W. along the same shore 26.50 chains—thence N. 56° W. 7.00 chains—thence N. 22.55 chains—thence E. 21.53 chains to Napa bay—thence Southeastwardly along the shore of Napa bay to the upland, and thence with the sinuosities of the upland to the place of beginning, which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

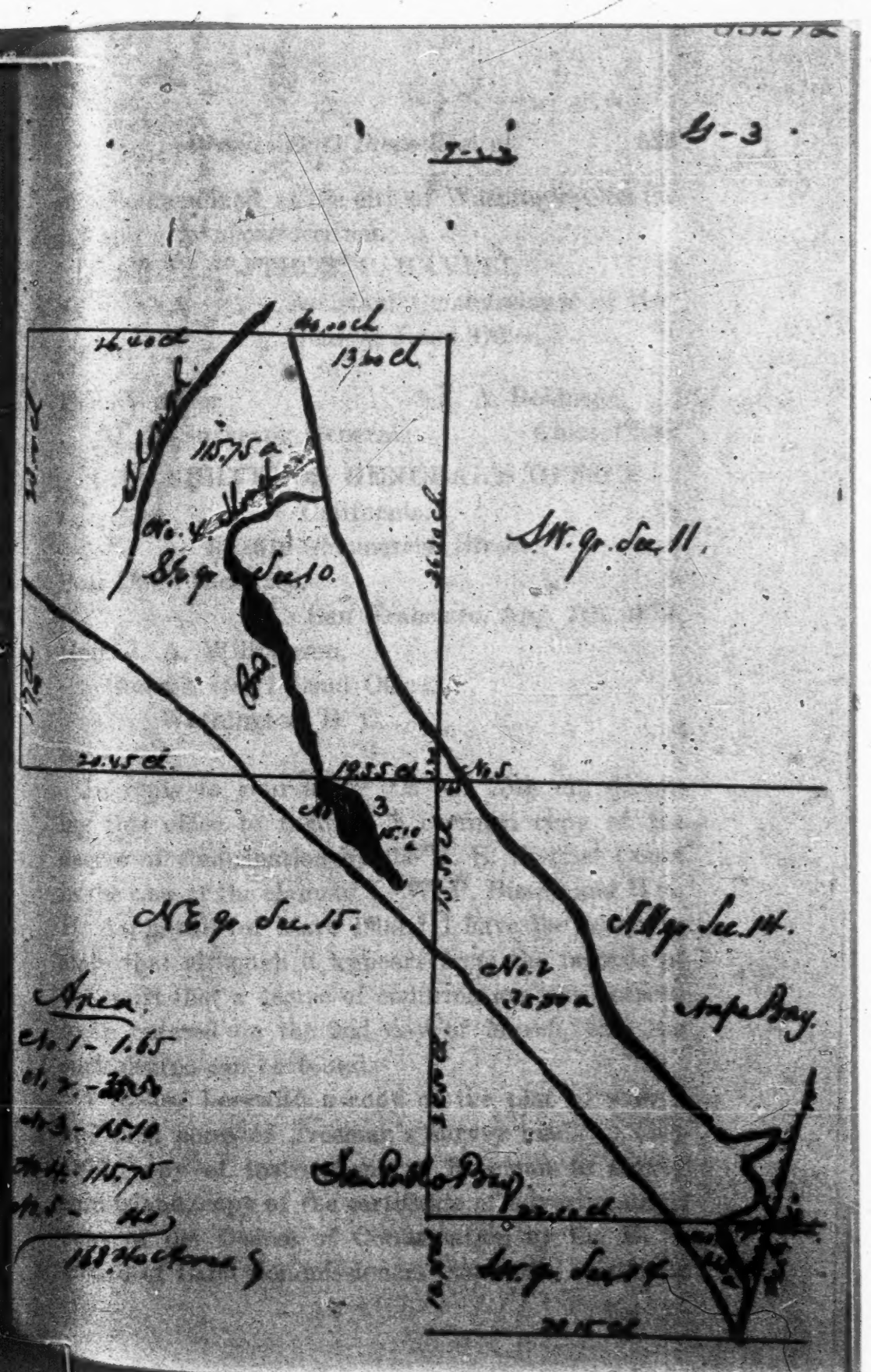
H. PATTON,
County Surveyor,
Solano County.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 4, 1929.

I hereby certify that the annexed copy of letter, dated August 7, 1879, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this


Area.
No 1 - 1.65
No 2 - 35.50
No 3 - 15.10
No 4 - 115.75
No 5 - 40
168.00 Hectares
No. 4
No. 2
No 3
No 1
NW qr Sec 11.
SW qr Sec 10.
NE qr Sec 15.
NW qr Sec 14.
Angle Bay
Stanley Bay
SE qr Sec 14.
24.45 ch.
19.55 ch.
13.20 ch.
46.00 ch.
36 inch
24 inch

office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

Theo. Wagner — U. S. Surveyor General
J. A. Robinson, — Chief Clerk

U. S. SURVEYOR GENERAL'S OFFICE
California.
No. 610 Commercial Street
Post Office Box 2260.

San Francisco, Aug. 7th, 1879.

Hon. J. A. Williamson,
Commr. Gen'l Land Office,
Washington, D. C.

Sir—

In reply to your letter "E" of 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and Wm. H. Aspinwall for Mare Island I have the honor to state that although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd day of March, 1857, no such decree can be found.

I inclose herewith a copy of the plat of survey and field notes of Freeman's survey made in July 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement; copy of the Decree of Confirmation by the U. S. Board of Land Commissioners; copy of a certificate

from the Clerk of the U. S. District Court with extracts from the minutes in the case;
and

A Protest filed in this office July 14, 1879 by Bernard T. Hanley, Esq., of Washington City as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138.

Very respectfully
Your obdt. Srv't,
THEO WAGNER
U. S. Sur. Gen'l.

No. 38856
THEO WAGNER,
U. S. Surveyor-General for California
Date, Aug. 7, 1879

Subject: Transmitting copy Plat of Survey and Freeman's field notes of survey of "Mare Island." Also certificate of advertisement etc. and states reasons for disapproving survey.

See letter from the Secretary of the Navy, dated Aug't 4, 1879.

See to Secy Int. Sept. 22, 1905 relative to making further survey under direction of G. L. O.

See 1343798

Referred to Division E

Received (G.L.O.) Aug. 18 1879. 8 Papers.

We offer in evidence report of W. J. Lightfoot, a United States Surveyor, dated January 6, 1915.

(The document was received in evidence, marked "Plaintiff's Exhibit T".)

PLAINTIFF'S EXHIBIT T.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 5, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a copy of the report of examination and investigation of alleged swamp and overflowed land and report of extent of Mare Island in Townships 3 and 4 North, Range 4 West, Mount Diablo Meridian, executed by W. J. Lightfoot, U. S. Surveyor, under instructions dated January 6, 1915, the original of which is on file in this office.

[Seal] FRANK E. BARKER
Office Cadastral Engineer.

(U. S. Surveyor General's Office. Oct. 11, 1915. San Francisco, Cal.)

FIELD NOTES
of the
Examination and investigation of alleged "Swamp and Overflowed" land and Report on extent of Mare Island, in Townships 3 and 4 North, Range 4 West, of the Mount Diablo Base and Meridian, in the State of California,

EXECUTED BY
W. J. Lightfoot.

In the capacity of U. S. Surveyor, under instructions dated Jan. 6, 1915, issued by the United States Surveyor General to govern surveys included in investigations, which were approved by the Commissioner of the General Land Office, Feb. 15, 1915.

Examination commenced Aug. 2, 1915.

Examination completed Aug. 9, 1915.

GENERAL REPORT.

Rendered under special instructions dated January 6, 1915, for an examination and investigation of alleged swamp and overflowed lands in Tps. 3 and 4 N., R. 4 W., M. D. M.

I have made a thorough examination and investigation of the region of these townships with regard to the character of the land lying between the navigable channels and the patented private claims.

From my personal inspection of these lands embraced in the said application of the State of California by its State Surveyor General for certification to it of all the swamp and overflowed lands returned as such on plats of Tps. 3 and 4 N., R. 4 W.,

M. D. M., approved March 4, 1863, as provided by Sec. 4 of an Act of Congress approved July 23, 1866, they are, at the present time, "swamp and over-flowed" lands as designated in the Act of Congress described as the swamp land act, dated Sept. 28, 1850. The land in the above townships lying between the navigable channels and the patented private claims, is "swamp and overflowed" land as designated in the said Act, because it is rendered swampy and unfit for cultivation by the presence of water thereon above ordinary high tides, which land by the existence of such swampy condition is rendered unfit for the growth of the ordinary crops of the locality in which the said land is found, without the reclamation of the same by means of diking and drainage.

The cause which makes the land too wet for cultivation is drainage from adjoining upland, extreme high tides and a near surface underflow. Levees have been built in each township near the line of ordinary high tide.

These levees built by private parties, consist of an earth bank about ten feet wide on top, with a slope of 2 to 1, and for the greater part of their length do not exceed about 4 feet in height. The levees on the west side of Napa Creek, on Mare Island and on Island No. 2, were built about 30 years ago. The levees on the east side of Napa Creek were built 1 or 2 years ago.

These lands in each township are intersected by navigable creeks and sloughs. All of these lands are

"swamp and overflowed lands" (See statement showing estimate of area)

To determine the condition of the lands in Tps. 3 and 4 N., R. 4 W., M. D. M., at the time of the Grant, I have secured evidence from residents in the locality who were familiar with the character of the lands at an early date, as follows:

Affidavit of Thomas V. Dixon, who has known the land since 1853.

Affidavit of P. M. G. Vallejo, who has known the land since 1850.

I have also secured the affidavit of Justice J. A. Browne in regard to the character and standing in the community of the above affiants.

All the information obtained from the above named affiants indicates that the land embraced in the said application of the State of California by its State Surveyor General, was, when they first became acquainted with it, "swamp and overflowed" land, as designated in the Act of Congress described as the swamp land act, approved Sept. 28, 1850.

W. J. LIGHTFOOT,
U. S. Surveyor.

GENERAL REPORT.

Examination to determine the extent of Mare Island.

I made a thorough examination of all the lands lying in Tps. 3 and 4 N., Rs. 4 W., M. D. M., for the purpose of determining the exact lands forming or appurtenant to what is known as Mare Island. I drove in a buggy from the Engineering buildings at the Navy Yard, in a northwesterly direction about five miles on dry land, and found that the "swamp

and overflowed" land extends about two and a half miles into Tps. 3 and 4 N., R. 5 W., M. D. M. That portion of the "swamp and overflowed" land which is a part of Mare Island is indicated on the attached sketch in red. This land has been partly reclaimed by levees which are not in very good condition at the present time. None of this land is used by the U. S. Navy Department in any way, but it is used by private parties for pasture and hay land. There are three or four ranch houses, with out buildings in a dilapidated condition, on the island.

In Vol. 212, page 766 of the Federal Reports, Judge Van Fleet, in the case of E. H. Sawyer vs. Osterhaus, is quoted as follows:

> "The land is physically a part of the body of land officially known and designated, as 'Mare Island', now and for many years, a Government Reservation as a naval station, which lies in a northerly arm of the Bay of San Francisco, technically known as San Pablo Bay. Historically speaking, and as depicted on the maps of the State, Mare Island was apparently at one time a territory comprising several thousand acres. As thus shown, its southerly projection, resting in San Pablo Bay, consists of a compact body of high land bearing a general resemblance to the low hill or rolling land found on the adjacent main land, from which higher part, or head, there extends to the northwest a low narrow neck or strip, connecting it with a much larger body of low, swampy land, spreading out fanlike for several miles in the same general

direction. This body of land as thus described was bounded by San Pablo Bay on the south and west; by Mare Island Straits and Napa Bay on the east; and Sonoma Creek on the north, all navigable. At the date of the reservation of the island as a Naval base this entire territory was supposed to be embraced within its limits, and the evidence tends to show that during the early years of its occupancy, steps were taken by the Government Authorities, looking to the assertion of dominion over the whole of this area for such purpose."

Mr. James Lane, a Government Employee at the Navy Yard has known this land since 1866. He states that the land is only overflowed by extraordinary high tides. In early days wood was scarce on the island and it was necessary to haul driftwood from the northwestern part of the island along the beach. Just north of the present steam engineering building at the Navy Yard, there was a strip of land about 20 or 30 feet in width that was dry at all times, except when covered by extreme high tides. He drove across this strip while hauling wood.

Mr. Thomas V. Dixon, a resident of this vicinity, has known this land since 1853. He followed hunting and boating and was familiar with the conditions as they were then. He states that the land back of the steam engineering building at the Navy Yard, was overflowed by high tides and that he has crossed the same many times in a small boat. There

was a neck of land extending from back of the present steam engineering building at the Navy Yard, north to a slough, and in the center of this land, was quite a large pond at low tide, with a narrow strip of land on each side. He often pulled his boat over this small strip of land (about 20 feet) into the pond, rowed across the pond and then pulled his boat out and across the narrow strip of land into San Pablo Bay. He was employed by the Government on a survey of the tule land north of the Navy Yard, taking a small sloop along, aboard of which the surveying party slept and ate. He hunted ducks with Admiral Farragut and other officers of the Yard.

At the present time, this narrow strip of land, has been made several hundred feet in width, by dredging.

In Vol. 28, page 714 of the Federal Reports, Judge Field, in the case of San Francisco Savings Union et al, vs. Irwin, is quoted as follows:

> "From the date of that conveyance (made to the U. S. Jan. 4, 1853) the United States has been in possession of the island and has constructed there large and expensive buildings for the uses of the Navy including a Navy Yard. They have also occasionally asserted ownership over the adjacent overflowed lands, but the acts done by them, were not of a character to indicate any settled purpose of occupancy of the lands or of devoting them to any public uses. They have not constructed any levees

to prevent their overflow or made any efforts to reclaim the lands or to subject them to any uses of the Government. Two shanties 10 x 12 feet were erected in 1874 or 1875 on the lands nearly eight miles from the island, but were soon abandoned, and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands if done by a private party would not bar the plaintiffs from asserting their right of possession."

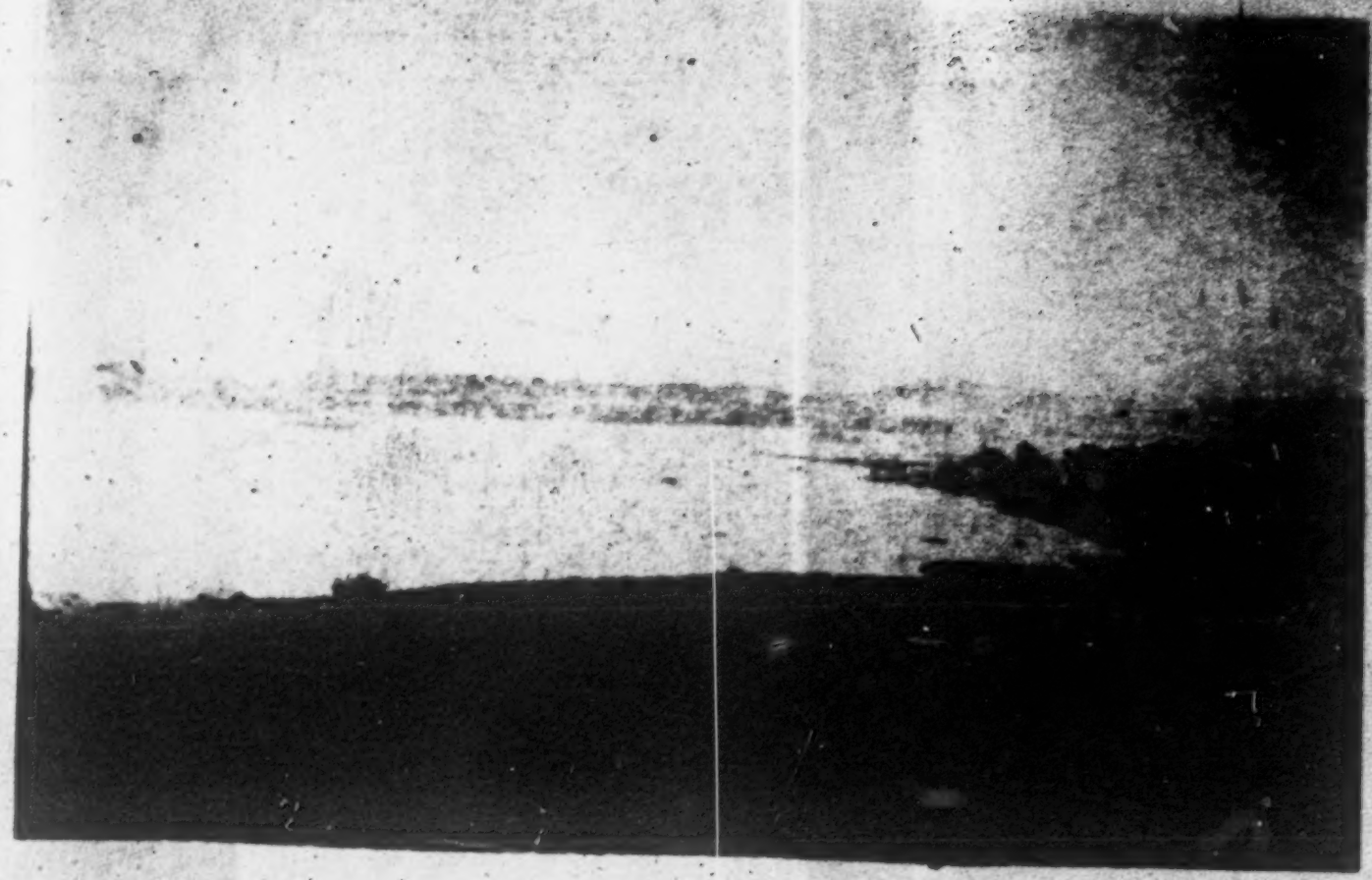
All "swamp and overflowed" land in the State of California passed to the State under the Act of Sept. 28, 1850. The date on which Mare Island was conveyed to the United States for uses of the Navy, is Jan. 4, 1853. It might be inferred from this that the "swamp and overflowed" land was not conveyed to the United States.

The results of my personal examination leads me to the conclusion that the "swamp and over flowed" land indicated on the attached sketch in red, is physically a part of the body of land known and designated as Mare Island. It is not at this time nor has it been at any time separated from the compact body of high land on which the Navy Yard is located. The Government is now in possession of and is using all of the "swamp and overflowed" land lying southeast of the line on the attached sketch, marked A-B. This strip of land extends about one mile in a southeast direction, from

the line marked A-B, and is all northwest of the narrow neck of land which connects the "swamp and overflowed" land to the high land. If the United States by the conveyance, dated Jan. 4, 1853, acquired title to any of the "Swamp and overflowed" land, northwest of this narrow neck of land, it certainly acquired title to all that body of "swamp and overflowed" land shown on the attached sketch in red.

W. J. LIGHTFOOT,
U. S. Surveyor.

PICTURE NO.1.



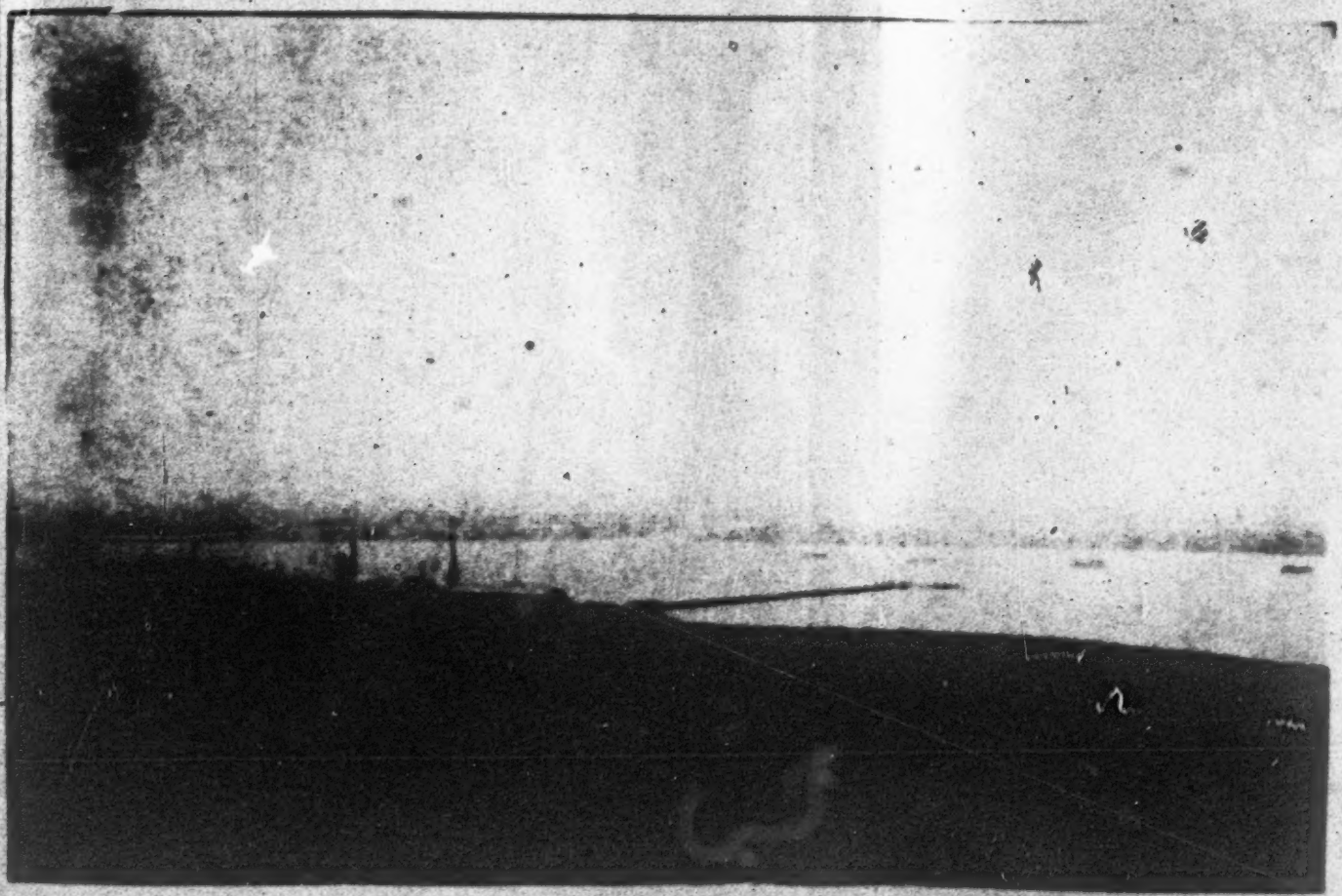
A--MARE ISLAND NAVY YARD.

B--STEAM ENGINEERING BUILDINGS.

C--PART OF THE CITY OF VALLEJO.

This picture was taken from Vallejo Heights looking south toward Mare Island.

PICTURE NO.5.



A.-- DUTCHMAN'S SLOUGH.

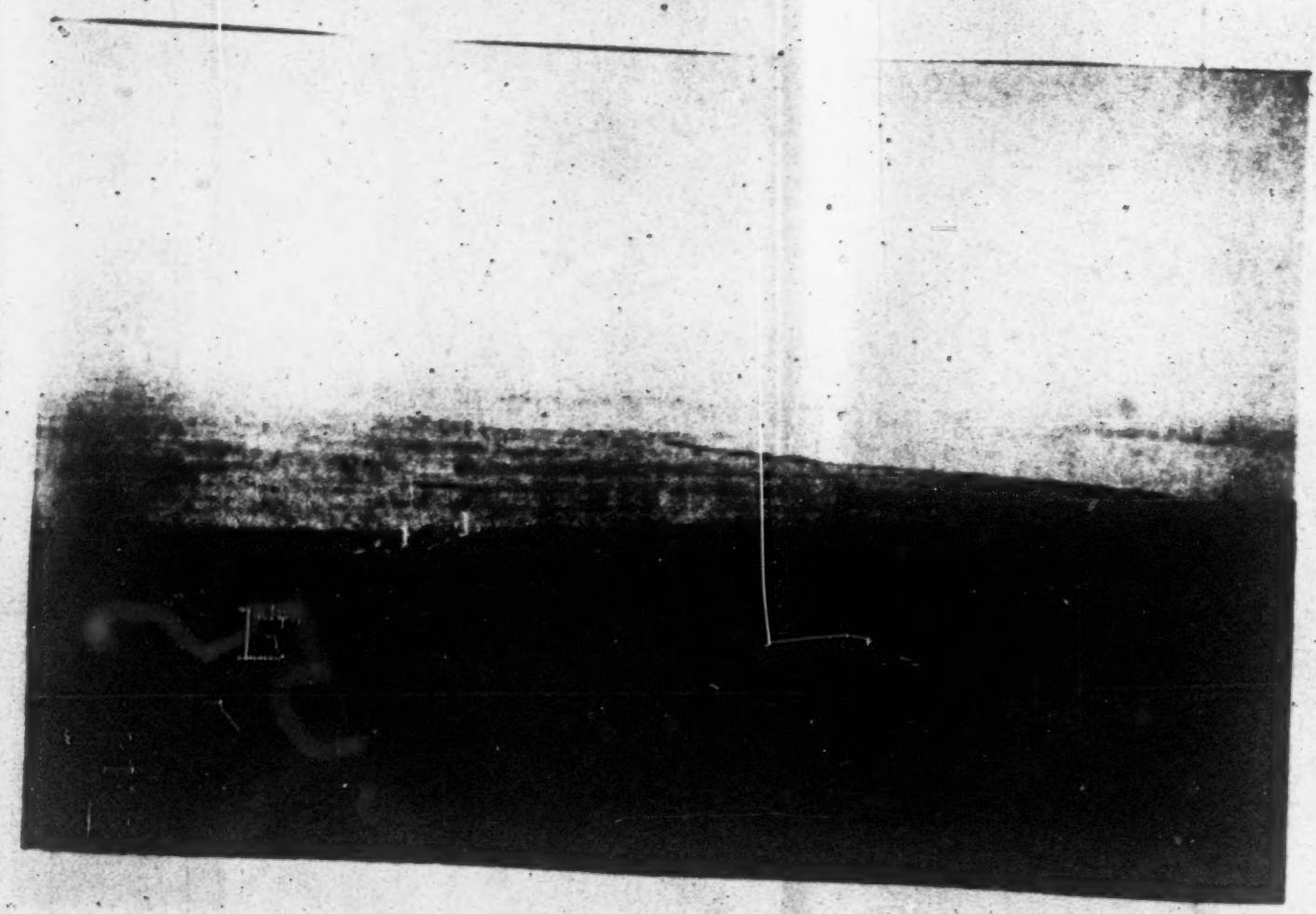
B.-- BRICK WORKS.

C.-- NAPA CREEK.

D.-- SWAMP AND OVERFLOWED LAND NORTH OF MARE ISLAND.

This picture was taken from Vallejo Heights looking west across Napa Creek.

PICTURE NO.5.



A.-- SLAUGHTER HOUSE POINT.

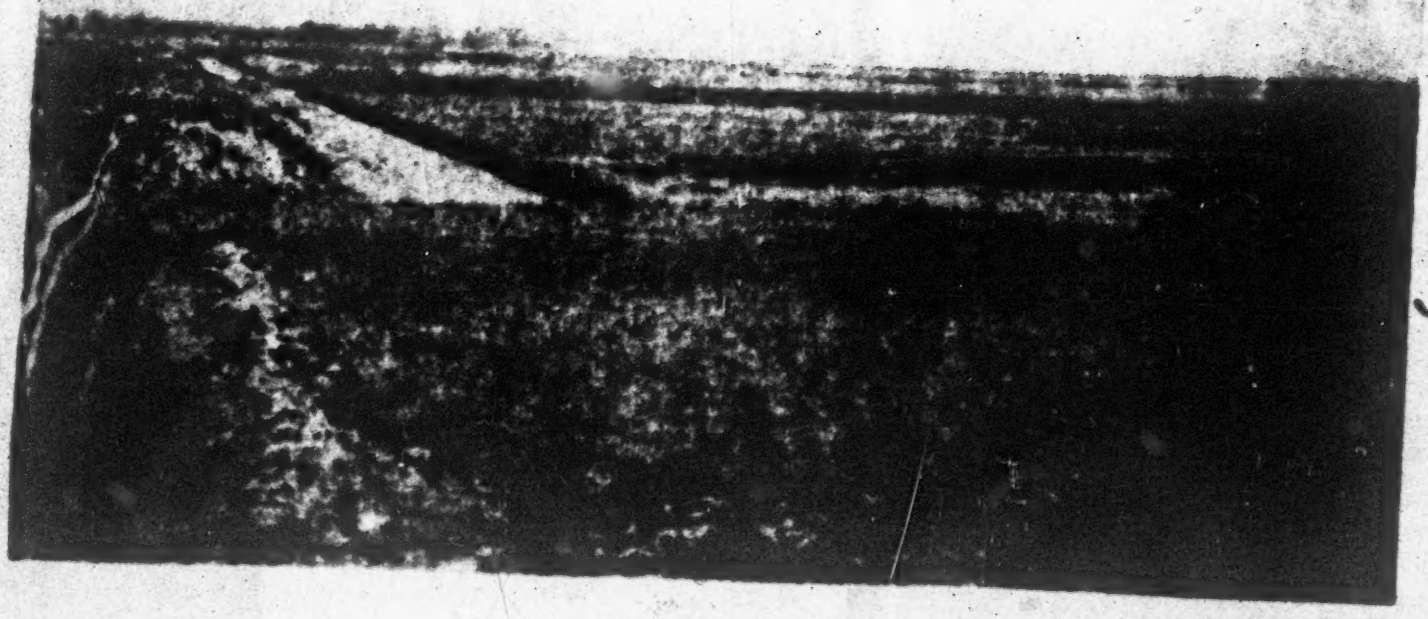
B.-- LEVEE.

C.--.RANCH HOUSE ON SWAMP AND OVERFLOWED LAND.

D.-- LEVEE.(PICTURE NO.6 WAS TAKEN FROM THIS POINT).

This picture was taken from Vallejo Heights looking north west.

PICTURE NO.4.



A.-- DRAINAGE DITCH. (THIS IS THE SAME DITCH SHOWN IN PICTURE NO.5.)

B.-- HAY FIELD.

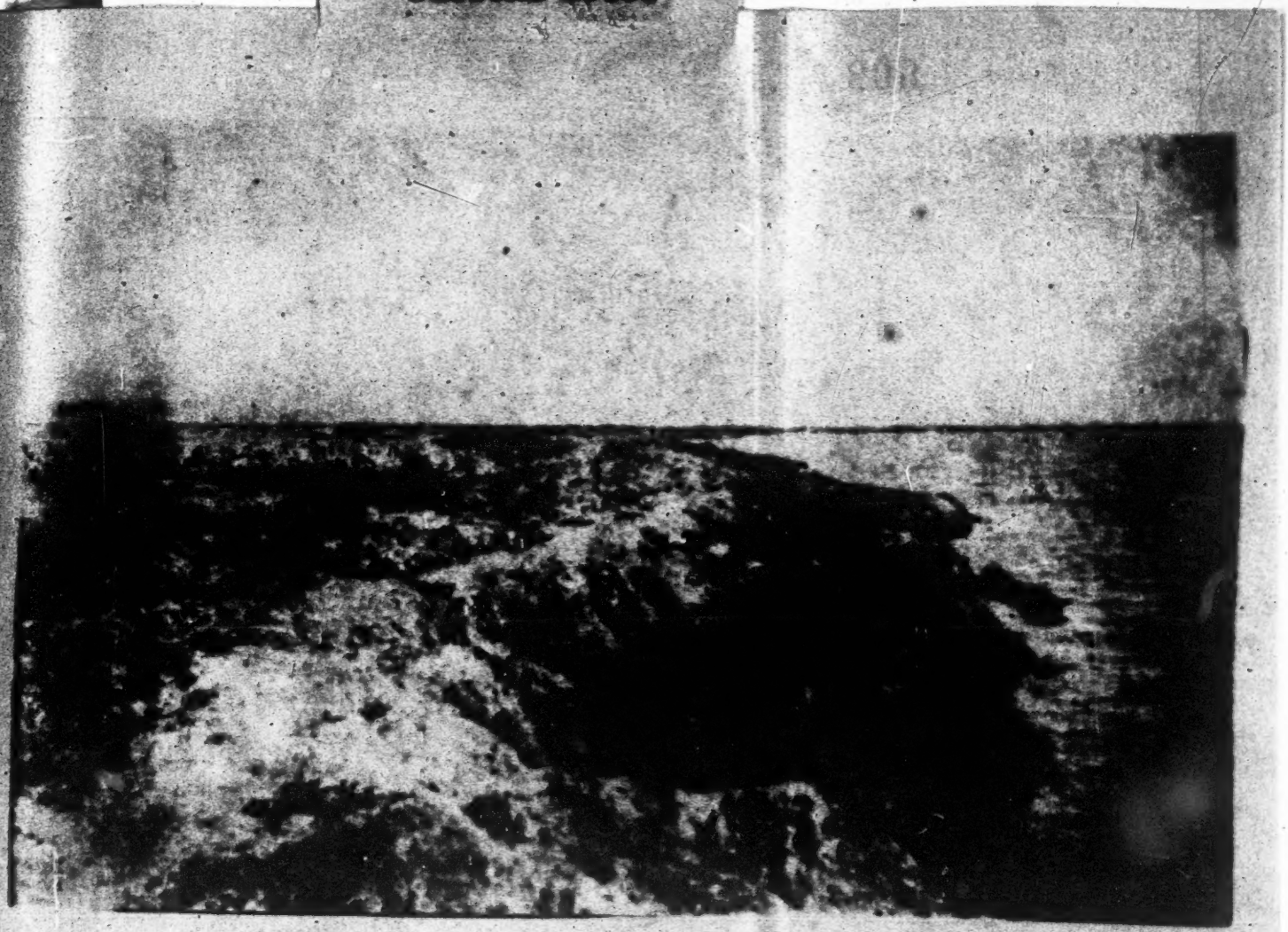
This picture was taken about 10.00 chains east of the ranch house shown in picture No.3, and was looking north across the swamp and overflowed land in sec.1 and 2, T. 3 N., R. 4 W., M.D.M.

PICTURE NO.5.

A.-- RANCH HOUSE SHOWN AT "C" IN PICTURE NO.3.

This picture was taken at point "A" in picture No.4 and shows a drainage ditch which drains west into Napa Creek at point "A" in picture No.6.

PICTURE NO.6.



A.-- POINT WHERE DRAINAGE DITCH SHOWN IN PICTURE NO.5, EMPTIES INTO NAPA CREEK.

B.-- LEVEE.

This picture was taken at point D. shown in picture No.3, and is looking north.

Estimate of

Swamp and Overflowed land in Tps. 3 and 4 N., R. 4 W, M. D. M.

In T. 3 N., R. 4 W., M. D. M.

Section	In Mare Island Acres	Not in Mare Island Acres
1.		280.00
2.		160.00
3.	360.00	
4.	600.00	
5.	600.00	
6.	360.00	
8.	40.00	
9.	320.00	
10.	440.00	
11.		40.00
12.		280.00
15.	40.00	
Township Total	2760.00 A.	760.00 A.

In T. 4 N., R. 4 W., M. D. M.

2.	40.00
3.	600.00
4.	440.00
5.	120.00
7.	480.00
8.	360.00
9.	600.00
10.	400.00
15.	520.00
16.	360.00

Section	In Mare Island Acres	Not in Mare Island Acres
17.		400.00
18.		640.00
19.		640.00
20.		600.00
21.		200.00
22.		200.00
23.		280.00
26.		520.00
27.		280.00
28.		640.00
29.		520.00
30.	80.00	560.00
31.	600.00	40.00
32.	160.00	440.00
33.	120.00	440.00
34.		160.00
35.		200.00
Township Total	960.00 A.	10680.00 A.

Township	In Mare Island Acres	Not in Mare Island Acres
T. 3 N, R. 4 W, M. D. M.	2760.00	760.00
T. 4 N, R. 4 W, M. D. M.	960.00	10680.00
Total	3720.00 A.	11440.00 A.

In Mare Island.	3720.00 A.
Not in Mare Island.	11440.00 A.
Grand Total.	15160.00 A.

State of California,
County of Solano.—ss.

J. A. Browne being duly sworn deposes and says; I am now and have been Justice of the Peace in Vallejo, California, for a period of eight years. I know Thomas V. Dixon and Dr. P. M. G. Vallejo whose affidavits have been shown to me in reference to the character of the land situated in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, and claimed to be swamp and overflowed lands. The affiants heretofore named, are men of good character and standing in the community, whose statements under oath or otherwise are worthy of full faith and credence.

JNO. A. BROWNE,
Justice of the Peace.

Subscribed and sworn to before me this 9th day of August 1915.

[Seal] JAMES H. O'LEARY
Notary Public in and for the County of Solano.
My commission expires Feb. 4th, 1919.

In the Matter of the Ascertainment of the Character of the Lands in Townships 3 and 4 North, Range 4 West, M. D M. on Sept. 28, 1850.

AFFIDAVIT OF THOMAS V. DIXON.

State of California,
County of Solano.—ss.

Thomas V. Dixon, being first duly sworn, deposes and says; I am a resident of the County of

Solano; I have known the character of the land in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, constantly since the year 1853, and have been a resident of this County continuously since 1853; I became acquainted with the character of this land as it was then by reason of having been hunting over it, and by boating and hauling drift wood over it.

To the best of my knowledge and belief the land shown as "Swamp and Overflowed Land" on the attached sketch was "Swamp and Overflowed land" when I first knew it. The land is so swampy and overflowed during every planting, growing and harvesting season, as to be unfit for cultivation in any of the staple crops of this County, without the use of artificial means of reclamation. The land is made unfit for cultivation by being overflowed by extreme high tides which overflow the surface to considerable depth, and also by being saturated by a near surface underflow from the sea. The said lands are above ordinary high tides and can be reclaimed by the construction of levees and proper drainage.

THOS. V. DIXON

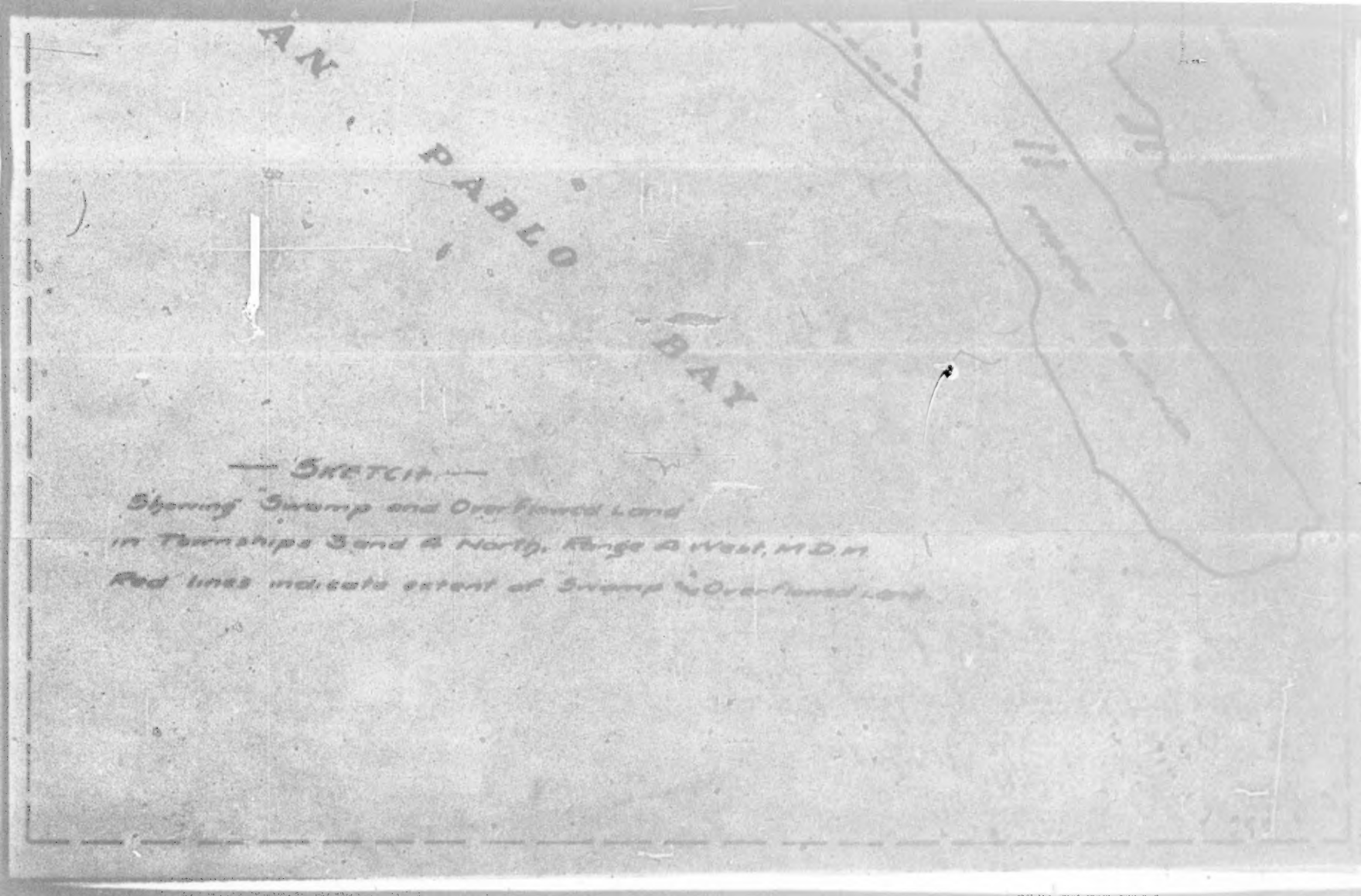
Subscribed and sworn before me on this 6th day of Aug. 1915.

[Seal] JAMES H. O'LEARY

Notary Public in and for the County of Solano.

My commission expires February 4th, 1919.

Overflow Land
Overflow Land
Overflow Land



— SKETCH —

Showing Swamp and Overflowed Land
in Townships 3 and 4 North, Range 2 West, M.D.M.
Red lines indicate extent of Swamp & Overflowed Land

BLANK

PAGE

In the Matter of the Ascertainment of the Character of the lands in Townships 3 and 4 North, Range 4 West, M. D. M. on Sept. 28, 1850.

AFFIDAVIT OF P. M. G. VALLEJO.

State of California,
County of Solanon.—ss.

P. M. G. Vallejo being first duly sworn deposes and says; I am a resident of the County of Solano; I have known the character of the land in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, constantly since the year 1850, and have been a resident of this County since 1850; I became acquainted with this land at is was then by reason of having hunted over it. The land in these townships belonged to my father who was General M. G. Vallejo.

To the best or my knowledge and belief, the land shown as "Swamp and overflowed land" on the attached sketch was "swamp and overflowed land" when I first knew it. The land is so swampy and overflowed, during every planting, growing and harvesting seasons, as to be unfit for cultivation in any of the staple crops of this County, without the use of artificial means of reclamation. The land is made unfit for cultivation by being overflowed by extreme high tides which overflow the surface to considerable depth, and also by being saturated by a near surface underflow from the sea. The said lands are above ordinary high tides and can be reclaimed by the construction of levees and proper drainage.

P. M. G. VALLEJO

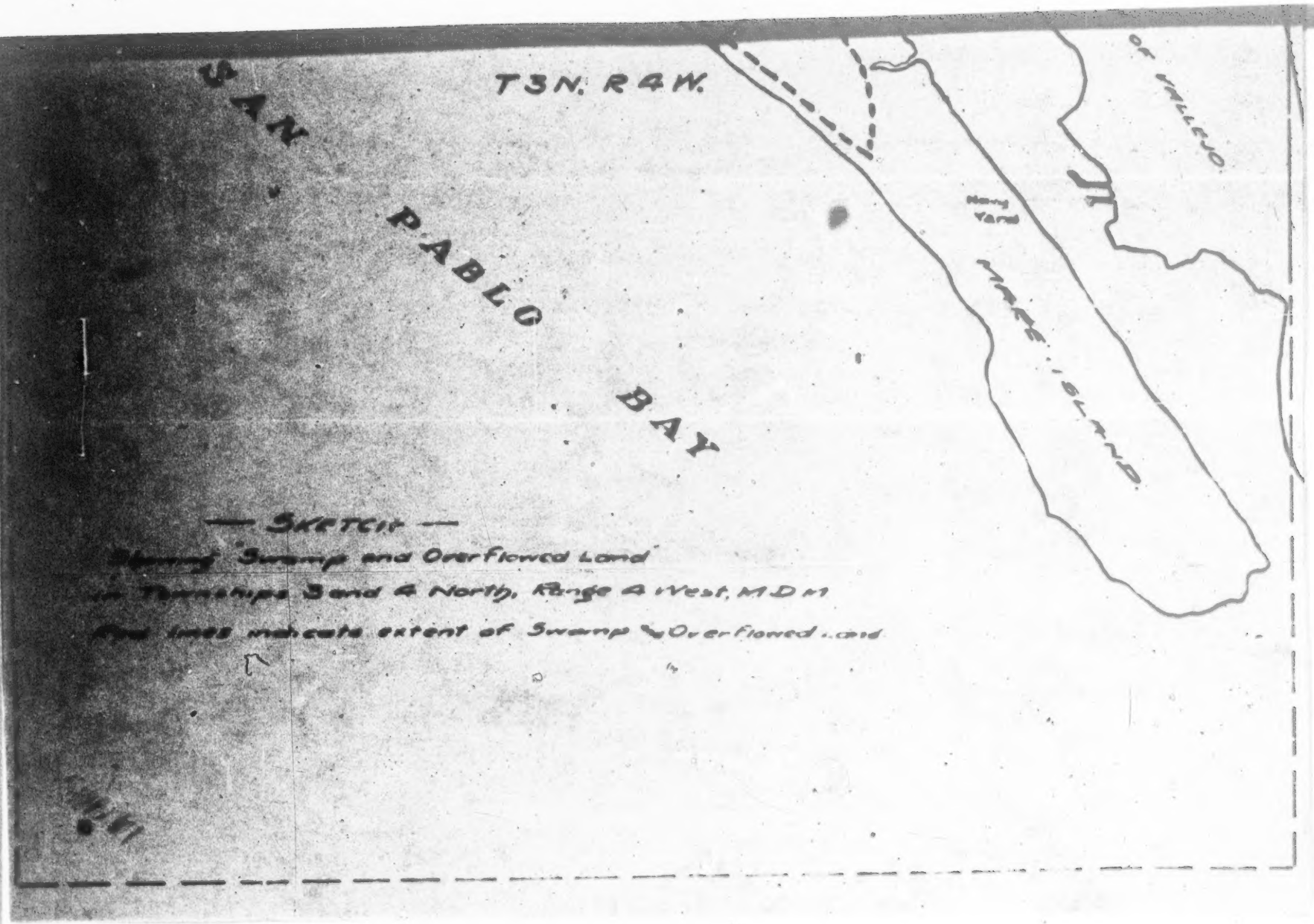
Subscribed and sworn to before me, this 7th day of Aug., 1915.

[Seal] OSCAR W. HILTON

Notary Public in and for the County of Solano.

My commission expires July 22, 1916.

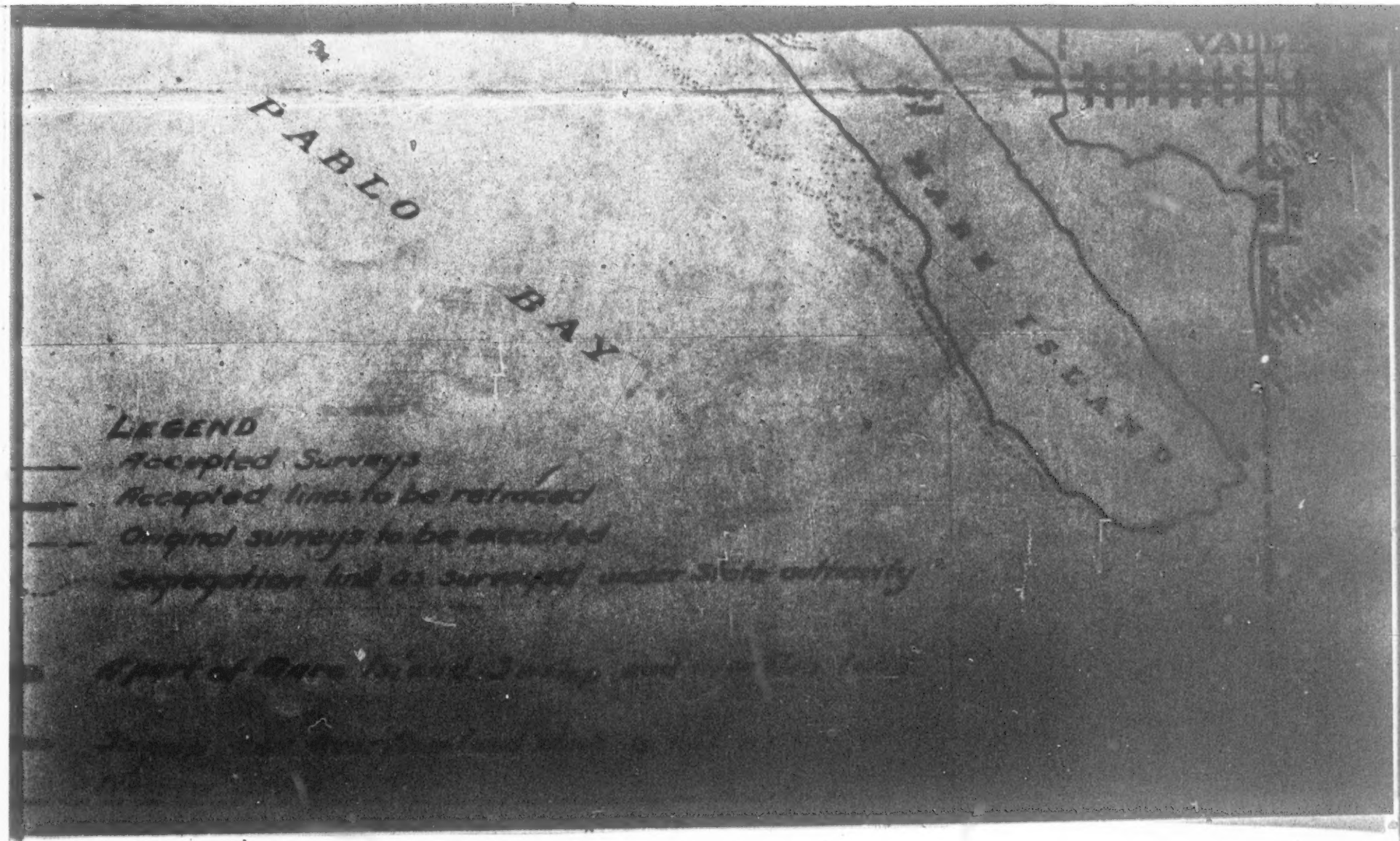
Sec 1
Sec 12
Sec 13
Sec 24
Sec 25
Sec 36
Sec 2
Sec 11
Sec 14
Sec 23
26
Sec 1
Swamp and Overflowed Land
CITY OF VALLEJO
Swamp and Overflowed Land
NAPA
CREEK.
T.4N.; R.4W.
T.3N. R.4W.
SAN PABLO

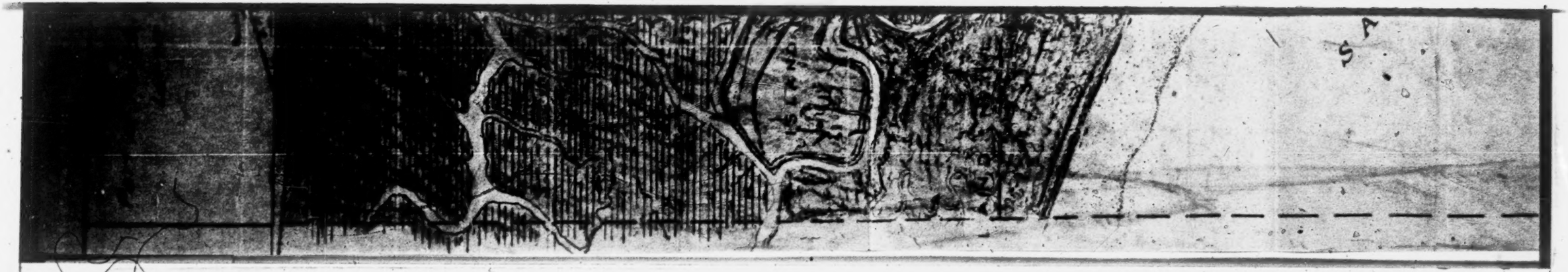

T3N. R4W.
SAN PABLO BAY
OF VALLEJO
— SKETCH —
Showing Swamp and Overflowed Land
in Townships 3 and 4 North, Range 4 West, M.D.M.
Red lines indicate extent of Swamp & Overflowed Land

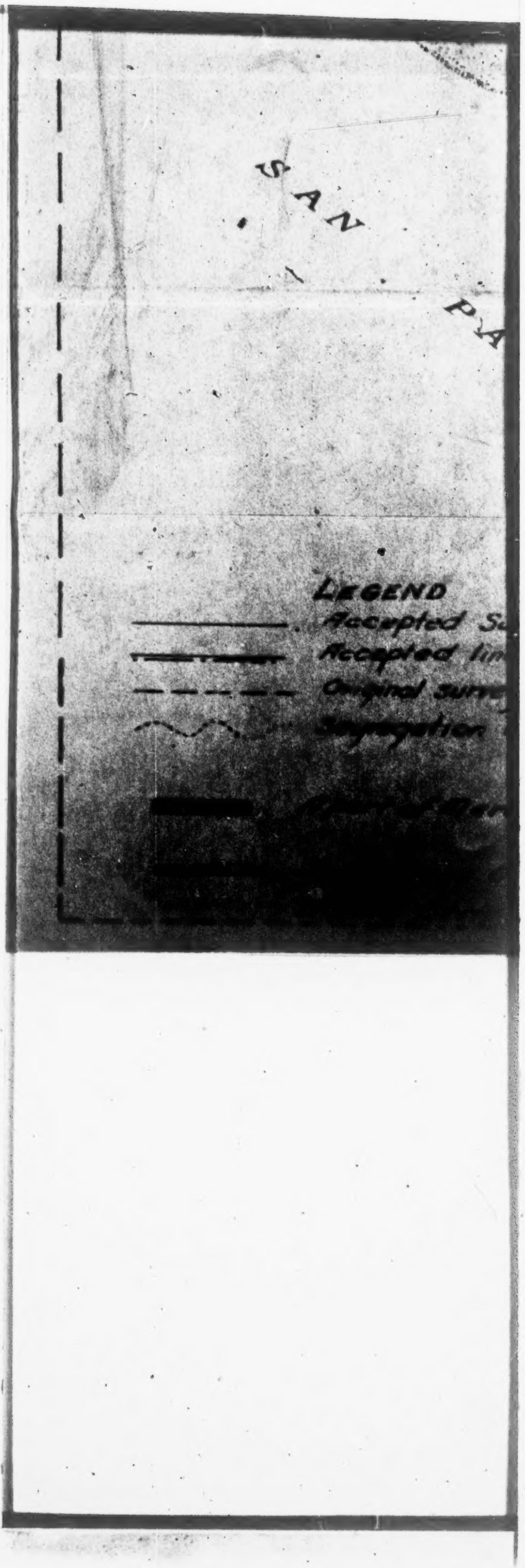
CREEK

T.3N, R.4W.

SAN PABL


PABLO
BAY
LEGEND
Accepted Surveys
Accepted lines to be retraced
Original surveys to be accepted
Segregation lines as surveyed under State authority


S A


SAN
P
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Accepted Su
Accepted lin
Original surv
Segregation

We offer the report of Francis E. Joy, U. S. Cadastral Engineer, dated October 23, 1922, and General Land Office letter of July 10, 1931, including the field notes, all as one exhibit.

(The documents were received in evidence and marked "Plaintiff's Exhibit U".) [248]

PLAINTIFF'S EXHIBIT U.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of the report of Francis E. Joy, U. S. Cadastral Engineer, to the U. S. Surveyor General, San Francisco, California, dated October 23, 1922, relative to Townships 3 and 4 North, Ranges 4 and 5 West, Mount Diablo Meridian, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

REPORT

on

LANDS PROPERLY BELONGING TO MARE ISLAND

in

Tps. 3 and 4 N., Rs. 4 and 5 W.

Of the Mount Diablo Meridian, in the State of California.

Executed by Francis E. Joy, U. S. Cadastral Engineer. In the capacity of U. S. Surveyor....., under Special Instructions dated Jan. 27, 1921, issued by the United States Surveyor General to govern surveys included in Group No. 96, which were approved by the Commissioner of the General Land Office, Feb. 28, 1921, and Assignment Instructions dated July 11, 1921 and June 20, 1922.

Survey commenced ....., 19 .

Data for report obtained Aug. 3, 1921 to June 26, 1922.

Survey completed ....., 19 .

U. S. Surveyor General,
San Francisco, Calif.

Dear Sir:

Complying with the Special Instructions for Group No. 96, dated January 27, 1921, the following report is submitted in relation to the swamp and overflow lands adjacent to Mare Island in Tps. 3 and 4 N., Rs. 4 and 5 W.

The division line between the lands claimed by the general public and the lands occupied by the Navy Department is well defined at this time by a wire fence, noted on the line between sections 10 and 15, T. 3 N., R. 4 W. I am told that this position was arrived at through a Federal court decision in 1914 and that the fence was built soon thereafter. A search at fence corners failed to reveal any marked corners other than a post 4 ins. sq., painted white, and marking acreage subdivision to the northwest.

The question presented, in which it is asked to determine the lands properly belonging to Mare Island in 1850, is rather difficult to solve at this time. Breakwaters, levees, dredging, and filling, having had a tendenacy to change the conditions in the time elapsed. Occular evidence by witnesses at this time is impossible. The particular place that seems to be in question is a narrow strip or neck of land between the main channel of Napa River and San Pablo Bay on the line between secs. 14 and 15.

From the report submitted in 1915 by W. J. Lightfoot, U. S. Surveyor, I note that he interviewed a certain James Lane, an employee at the Navy Yard, who stated that he had known the lands in question since 1866, and that at extraordinary high tides this neck of land was overflowed.

Mr. Lightfoot also reports an interview with a Mr. Thomas Dixon, who claimed to have knowledge

of the lands in question since 1853, and verified Mr. Lane's statement, also makes mention of a pond on the neck of land. This pond probably occupied the ground I have termed, between secs. 14 and 15, a flat without vegetation and having the appearance of dried up tide land.

I further verified these statements in an interview with Mr. Otto von Geldern, at present a Consulting Engineer of San Francisco, and formerly an employee in the engineering department on Mare Island during 1873 and 1874. He states that he has often observed water flow over this narrow strip of land at extra high tide. Mr. von Geldern has made a continuous study for years in relation to lands of this character and at the present time is the engineer for several bodies of land in T. 4 N., R. 4 W.

Between secs. 14 and 15, I have noted two small sloughs, draining easterly to the main channel of Napa River. I am of the opinion that these sloughs were the outlets or drainage for the ponds mentioned by Mr. Dixon on the narrow strip of land. I was unable to follow or trace a definite channel from the bay to the river in this vicinity. Although there has been more or less filling by the Navy Yard, I believe a defined channel would be found in places at this time.

A long breakwater, known as Dike 12, built in sections from 1908 to 1912, and noted at the meander corners of fracl. secs. 23 and 26, and secs. 25 and 26, apparently has created a settling basin in secs. 15, 22, 23, and 26, and is rapidly filling on the San

Pablo Bay side. At the present time, from the cor. of secs. 14, 15, 22, and 23, I estimate that it is a mile in distance to the edge of the water at low tide. This probably accounts for the fact that there is no defined bank along the Bay side in sec. 15.

Further investigations, to the northwestward along the shore of San Pablo Bay, failed to show a channel or slough that would divide the island into two portions, with the possible exception in the easterly part of sec. 6. Two levees leave the bay in a northerly direction and parallel to each other, join a levee around a slough farther to the north. It was noted while on the ground that an extra high tide carried water up to the northern levee. However I believe this is a barrow pit and not a natural water course.

It was further noted that numerous small sloughs originate close to the bay shore, that is 8.00 chs. to 15.00 chs. inland, but instead of finding their way into the bay, that the rule is to drain away from the shore to the sloughs farther north. From this it is evident that the waters in the bay built up a slight elevation along the shore, and for that reason the smaller sloughs drained northward to larger sloughs with outlets through large channels to the right and left where resistence is less. There is evidence along the N. side of the island that several small sloughs have left a main slough and after more or less meandering rejoined the slough from which it had left. For instance, in sec. 4 a small slough leaves Dutchman Slough in a westerly direc-

tion, later joining Dutchman Slough again in sec. 5. Such seems to be the case with the slough that U. S. Deputy Surveyor, James E. Freeman in 1877, named Montgomery. However, after investigating this slough. I believe that the main channel left South or Navy Yard Slough and joined with Dutchman Slough to the southward instead of westward as shown on his plat. This slough must have been rather shallow in as much as the levees cross it about 10.00 chs. back from the main sloughs.

The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tides and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay. The slight elevation along the Bay shore forcing the water to drain northeastward to the main channel of Napa River. Therefore if this meets the definition of an island, Mare Island was bounded accordingly. However, from the conveyance in which it names "all the tule or low land and marsh belonging to same & etc.", it is my opinion that the island was bounded by waters that were considered navigable, and that the lands covered in my survey of Island No. 1 and Mare Island is one and the same island and that it extended into

R. 5 W., bounded on the North by South or Navy Yard Slough and Napa Slough, and on the West by Napa Slough and San Pablo Bay.

Very respectfully,

FRANCIS E. JOY,
U. S. Cadastral Engr.

San Francisco, Calif.
October 23, 1922.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of a portion of the field notes relating to fractional Township 3 North, Range 4 West, Mount Diablo Meridian, as executed by Francis E. Joy, U. S. Cadastral Engineer, as approved on October 23, 1923, by the U. S. Surveyor General for California, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

Meanders of Tract No. 38, Mare Island Navy Yards.

N. 55° 04' W., 8.27 chs. To Angle Point No. 5, heretofore described.

GENERAL DESCRIPTION.

The portion of this fractional township east of the main channel of Napa River (Not including lands previously surveyed) and all of that portion lying west of Napa River and north of Tract No. 38, Mare Island Navy Yard, is hereby returned as swamp and overflow within the meaning of the Swamp Act of September 28, 1850. The soil on the uplands is a clay loam mixed with some fine gravel, nearly all under cultivation. The soil in the marsh lands is an adobe loam, very fertile, and used for pastures east of the river.

West of the main channel of Napa River I have surveyed the land in two bodies, one of which I have termed Island No. 1 and Mare Island, the second and smaller is covered by portions of secs. 3, 4, 5, 9, and 10. The latter island is unprotected by levees and is covered with a heavy growth of tules and swamp grasses. The soil as an loam and would produce equal results with nearby islands if reclaimed. Island No. 1 is protected by levees and the major portion within the township has been cultivated. The soil, and adobe loam, is rather light because of the extensive root system of the previous marsh growth. The larger part of Mare Island is heavy rolling land, and at the south end reaches an approximate elevation of 200 ft. The Navy Department shops and works are along the water front facing Mare Island Straits and opposite the city of Vallejo.

Dutchman Slough, which is the S. bdy. of the island in secs. 3, 4, 5, 9, and 10 is used more or less at high tide as a passway for boats and some barges with shallow draft.

At low tide this slough is very narrow and shallow for about a half mile before joining South or Navy Yard Slough, and for that reason is avoided as a water passway to some extent.

All of the land west of the main channel of Napa River and north of fence at N. bdy. of Mare Island Navy Yard is supposed to be covered by State Segregation Survey No. 569. I was unable to find any definite marks of this survey, neither could the Agent for the present claimants of the lands tell me of an existing mark.

June 25, 1922: At 9h a. m., on the true meridian in sec. 4, I determine the magnetic declination to be 18° 35′ E., and no material difference was noted throughout the township.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of a letter from the Commissioner of the Gen-

eral Land Office, Washington, D. C., dated July 10, 1931, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

Address Only the Commissioner of the
General Land Office

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

Jul. 10, 1931.

In Reply Please Refer to
1423855 "E" EGH
: Group 96, California.

District Cadastral Engineer,
Public Survey Office,
417 Market Street,
San Francisco, California.

Sir:

Mr. Edmund Burke on July 2, 1931, advised the Secretary of the Interior that the unaccepted plat showing the subdivision of the Mare Island Naval Reserve in T. 3 N., R. 4 W., M. D. M., California, is in the files of your office and requested that you be directed to furnish him with a certified copy of said plat.

The plat requested is the original plat of the survey executed by Engineer Joy showing the subdivision of the Mare Island Naval Reserve. This survey was not accepted and was ordered revised

by departmental decision of August 17, 1923. By letter dated September 19, 1923, approved by the First Assistant Secretary on the same date, the Surveyor General was directed to prepare special instructions providing for the necessary field work as outlined in departmental decision of August 17, 1923. The plat and field notes were returned to the Surveyor General on October 15, 1923. The revised plat of survey was accepted on November 8, 1923.

Mr. Burke was advised on July 8, 1931, by the Acting Secretary as follows:

> "If the unaccepted plat of T. 3 N., R. 4 W., showing the subdivision of the Mare Island Naval Reserve, has been kept by the public survey office at San Francisco, California, the Department has no objection to that office furnishing you with a certified copy of said plat. However, in order that there will be no doubt as to the official standing of the plat, the public survey office will be directed to place upon the plat a statement that will clearly show that it is a plat of an unaccepted survey and has no official standing. Also, the certification will indicate the facts in the case. The Commissioner of the General Land Office will instruct the District Cadastral Engineer at San Francisco, California, relative to granting your request."

and you are accordingly directed, if the plat is in your office, to furnish Mr. Burke with a certified copy.

It is suggested that the following statement be placed upon the plat before a copy is made and also incorporated in the certificate in substance:

> This plat of T. 3 N., R. 4 W., M. D. M., California, represents a survey which has not been accepted by the Commissioner of the General Land Office and which was ordered revised by departmental decision of August 17, 1923, in the case of State of California, Balfour-Guthrie Investment Company, interveners, and accordingly has no official standing as the representation of a survey made by the General Land Office.

The Navy Department has also requested a certified copy of this unaccepted plat. Mr. Philip Buettner, Principal Attorney, Navy Department, has been informally advised that the request for the copy of the plat should be made at your office. When this request is received a certified copy will be furnished without cost. All certified copies will be prepared in the manner outlined in this letter.

Very respectfully,

D. K. PARROTT,

Acting Assistant Commissioner.

Mr. PECKHAM: I would like, at this time, pursuant to notice, to move for leave to file an amendment to the bill of complaint, reciting the survey of Mare Island by Freeman, and the approval of that survey.

The COURT: Motion granted. I suppose you wish to have the amendment deemed denied?

Mr. KELBY: Yes.

Mr. PECKHAM: I will stipulate that it be deemed denied.

TESTIMONY OF HENRY L. VAN WINKLE

A witness for Plaintiff

I am the Secretary of the California Society of Pioneers and in charge of the library. I have been subpoenaed to and I herewith produce two books, the first the historical atlas of Solano County, dated 1878, which is from the archives of the Pioneers' Society Library. This book is accepted as an authentic book of Solano County of the date it bears date.

Mr. PECKHAM: This photostat of the first page, or preface, and some data appears, particularly this map of Solano County, a map of Mare Island and an enlargement of that map of Mare Island, and further a map of the north Navy Yard at Mare Island.

WITNESS continuing: The second book which I produce is a history of Solano and Napa Counties by Tom Gregory, a gift of Edwin H. Sawyer, who was one of our members and presidents. This book is also from the archives of the Pioneers' Society and is considered an authentic presentation of the biographies in it and is consulted constantly. The biography of Edwin H. Sawyer, found at Page 655-56 of this book, is the man who donated the book and whose presentation is on the front page.

(The two documents were received in evidence.)

Mr. KELBY: I object to it as immaterial, irrelevant and incompetent and as an attempt to vary the description contained in the deed of conveyance from Aspinwall, et al., to the United States. [249]

The COURT: Overruled and exception.

(The two documents were received in evidence as "Plaintiff's Exhibit W".)

Mr. PECKHAM continuing: We offer in evidence the photostat from the History of Solano and Napa Counties of the life of Edwin and Henry Sawyer and as part of the same exhibit the file of the General Accounting Office Payroll as of August 11, 1879, showing that E. H. Sawyer was Corresponding Clerk in the Office of the United States Surveyor General of California on August 11, 1879 and the Chief Correspondence Clerk for Theodore Wagner, who wrote the Wagner letter.

(The document was received in evidene as part of "Plaintiff's Exhibit W".)

PLAINTIFF'S EXHIBIT W

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

HISTORY OF SOLANO AND NAPA COUNTIES

where he is a large property owner and where, before his retirement from all public and business

cares, he served as postmaster, road supervisor and justice of the peace. Although now retired, he maintains a warm interest in all local and state activities. Few have done more than he to advance the welfare of his community and none has displayed a more steadfast interest in all movements for the material, moral and educational upbuilding of town and county.

EDWIN HENRY SAWYER.

Out from the valley of the far-distant past, memories of pioneer experiences refresh the declining years of Mr. Sawyer and form a sacred link between the chaos of the frontier and the refinements of a twentieth-century civilization. Gone are the majority of his comrades of the historic '50s; gone, too, are the enthusiasm and unwearied energies of his youthful years; but there still remain, to cast a golden glow over life's restful twilight, happy memories of the associations and the activities of bygone days. Perhaps no recollection is more deeply impressed upon his mind than that of his long voyage in 1851 from the shores of the Atlantic ocean via Nicaragua to the Pacific coast, where he joined his father, Jesse Sawyer, a pioneer of '49, and a man of forceful ability, well qualified to meet all problems connected with frontier existence. The family had been early established in Massachusetts and long identified with Haverhill, that state, where Edwin H. was born in 1831 and whence his father had migrated to the Pacific coast, making the long voy-

age around the Horn on the sailing ship Leonore, and acting as vice-president of the company of one hundred persons on board the vessel.

The historic Sawyer house, occupying a prominent location on the waterfront at Benicia, was built by Jesse Sawyer and under his keen oversight developed into one of the most popular inns of pioneer days. Among its guests from time to time were men prominent in the material and political history of the commonwealth. For years it was a favorite stopping place of the traveling public, who were attracted no less by the geniality of the proprietor than by the close attention given to their material welfare. The young easterner who landed at Benicia in 1851 sought employment there and soon received an appointment as agent for the Adams Express Company, in which capacity he made many trips over the hills from Benicia to Vallejo. No roads had been laid out. Travel was attended by innumerable hardships. Only men of pluck and daring were willing to accept positions necessitating constant travel. The legislature held its sessions at Vallejo, and when the express agent attended the sessions he found the members armed with revolvers and sitting with their feet on their desks. Dignity was not a characteristic of the early legislators, but what they lacked in refinement they made up in energy.

Two years of service as express agent on the frontier terminated in 1853 with the return of Edwin H. Sawyer to the east, the trip being made via Panama. It was his intention to remain perma-

nently in New England, but the west had cast its fascinating spell upon him and in 1858 he returned to California, securing a position as clerk to his father, the naval store keeper at the Mare Island navy yard. Later he was transferred to different departments and eventually won a promotion to the position of chief accountant in the commandant's office at the navy yard. A visit of one year in Japan and adjacent countries gave him a comprehensive knowledge of that portion of the world. During 1862 he went east overland by stage and became chief clerk to the naval constructor of the Boston navy yard, but afterward returned to California and again resumed government service at Mare Island. Early in the '70s he erected a commodious residence at Vallejo overlooking the bay and this building is now considered one of the landmarks of the locality. During 1875 he secured a position in the San Francisco office of the United States surveyor general and for sixteen years he continued in the same capacity, discharging manifold responsibilities with devotion, tact and intelligence. Meanwhile, on two occasions, he was sent to Colusa county for the purpose of examining and auditing the books of the county officials, a task for which his expertness in accounting admirably qualified him.

Since retiring from business Mr. Sawyer has made his home part of the time at Berkeley, where he resides at No. 2640 Warring street, but he is so fond of the country that he passes a large part of each year on his ranch of one hundred and sixty acres, known as the Altissimo ranch, which lies in

Napa county a short distance back from Vacaville, Solano county. He finds enjoyment in setting out and watching the growth of the fruit trees on his ranch, in making improvements as needed and in directing the management of the property. On New Year's of 1866 he became a member of the Society of California Pioneers and ever since then he has been interested in the work of that organization. Much of his please is derived from association with other pioneers and in witnessing the remarkable development of the commonwealth with whose beginning he was associated as an early settler.

WALLACE T. RUTHERFORD.

A prominent attorney of Napa, Cal., Wallace T. Rutherford was born in Vallejo, Solano county, August 7, 1876. He received his primary education in the public schools of his native city and Calistoga and later attended Heald's Business College in San Francisco for one year, fitting himself for general commercial work. Completing this course he had made up his mind to study law, and to carry out his plans he went to Merced and for the following three and one-half years studied in the office of J. W. Knox, one of the most prominent lawyers of that city. By devoting himself assiduously to his study he was admitted to practice before the supreme court of the state on September 8, 1898. In the same month he came to Napa and opened an office and in the years that have intervened he has

built up a lucrative practice throughout the city and county. Besides this he has won the friendship of an ever increasing circle of friends by his genial nature and his strict integrity. Always popular as a citizen he was appointed to the office of city attorney of Napa, in 1907, and so faithfully did he perform his duties that he received the nomination for the office and was elected at the following election in 1909 and re-elected in 1911 for a term of four years. His efficiency and popularity are ever to the fore when he is spoken of by those with whom he has had business or social relations.

Mr. Rutherford's time has not been entirely taken up with his chosen profession for he has found time and opportunity to enter into the commercial field and is president and sole owner of the Shoults Paper Box Company of Napa, one of the prosperous concerns that has assisted in developing the city. In fraternal circles he has become an active participant and is a member of the Masons, the Eastern Star, Benevolent Protective Order of Elks, Order of Eagles, Woodmen of the World, Modern Woodmen of America, Native Sons of the Golden West, and is a "Fifth Degree" Granger. As an American citizen Mr. Rutherford is patriotic and he is first lieutenant, Company H, Second Regiment, National Guard of California. Since 1906, he has been secretary of the Republican County Central Committee and has taken a very active part in the politics of the county. He has been

United States [Insignia] of America

GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered R-1 to R-5, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: Theodore Wagner.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 6th day of April, in the year 1932, at Washington.

[Seal] R. N. ELLIOTT
Assistant Comptroller General of the United States.

Report No. 34102

GENERAL LAND OFFICE,

October 25, 1879

I HEREBY CERTIFY that I have examined and adjusted an account between the United States and Theo. Wagner, Surveyor General of California, under the appropriation of No. 2,2750, Acts of Mch. 3, and June 21, 1879, "For salaries, office Surveyor General of California, 1880," during the quarter ending September 30, 1879, and find that the latter stands chargeable thereon as follows, to wit:

To balance due from him per General Land Office Report No.	Amount.
To warrant No. 1325 dated July 30, 1879,	5687.50

I also find him entitled to credit as follows:

By amount of disbursements made by him during the quarter ending Sept. 30, 1879, as per abstract A and accompanying vouchers filed herewith	5256.16
Leaving a balance due the United States	431.34

As appears from the account, Register's Certificate, and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

J. M. ARMSTRONG
Actg. Commissioner.

To Hon. A. G. Porter,
First Comptroller of the Treasury.
Treasury Department,
Comptroller's Office,
December 9, 1879.

I admit and certify the above balance of $431.34 due the United States.

[Signature Illegible]
Acting Comptroller.

To the Register. W. L.

(A.)

ABSTRACT of payments made by Theo. Wagner, Surveyor General of California, under the appropriation of No. 2,2750. Acts of Mch. 3 and June 21, 1879, "For salaries, office Surveyor General of California, 1880," during the quarter ending September 30, 1879.

Date 1879	No. of Voucher	TO WHOM AND FOR WHAT PAID		Amount Paid.
Aug. 11	1	Theo. Wagner	Surveyor General	231.00
11	2	J. A. Robinson	Chief Clerk	168.50
11	3	J. H. Wildes	Chief Draughtsman	168.50
11	4	S. N. Bliven	Clerk of accounts	151.00
11	5	E. H. Sawyer	Corresponding clerk	151.00
11	6	R. Gibbons	Draughtsman	151.00
11	7	John Clar	Translator	168.50
11	8	A. E. Gans	Clerk	16.90
11	9	Anna Alexander	do	81.52
11	10	Geo. O. Jewett	do	97.83
11	11	Katie Short	do	67.93
16	12	A. L. Bancroft and Co.	Stationery for Spanish Archives	343.00
29	29	Theo. Wagner	Surveyor General	231.00
29	30	J. A. Robinson	Chief Clerk	168.50
29	31	J. H. Wildes	Chief Draughtsman	168.50
29	32	S. N. Bliven	Clerk of accounts	151.00
29	33	E. H. Sawyer	Corresponding clerk	151.00
29	34	R. Gibbons	Draughtsman	151.00
29	35	A. Bannister	do	121.74
29	36	L. E. R. Scidmore	Clerk	84.20
29	37	Minnie Moss	do	62.50
29	38	Anna Alexander	do	84.20
29	39	Geo. O. Jewett	do	101.10
29	40	John Clar	Translator	168.50
29	41	A. E. Gans	Clerk	19.54
29	42	Katie Short	do	84.20
Sept. 27	61	Theo. Wagner	Surveyor General	224.30
27	62	Theo. Reichert	Chief Clerk	163.00
27	63	J. H. Wildes	Chief Draughtsman	163.00
27	64	S. N. Bliven	Clerk of accounts	146.80
27	65	E. H. Sawyer	Corresponding Clerk	146.80
27	66	R. Gibbons	Draughtsman	146.80
27	67	A. Bannister	do	130.40
27	68	John Clar	Translator	163.00
27	69	Geo. O. Jewett	Clerk	97.80
27	70	Anna Alexander	do	81.00
27	71	Katie Short	do	81.00
27	72	Minnie Moss	do	81.00
27	73	L. E. R. Scidmore	do	81.00

Making an aggregate of....5256.18

General Land Office,
October 25, 1879.

Examined and stated by
J. W. DONNELLEY

General Land Office Report No. 34102
Dated October 25, 1879
Report of Adjustment of
QUARTERLY ACCOUNT
of
Theo. Wagner
Sur. Genl. of California
on a/c of Salaries
For the Quarter ending Septr. 30, 1879
For $5256. 16/100
R. and E. Oct. 29th, 1879
R. W. L.
Ent. Dec. 31/79 H M T

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from July 1, 1879, to July 31, 1879, inclusive, 31 days @ the rate of $1,800.00 per annum—$151.60/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, July 31, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and fifty one & 60/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

#5 34102
ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$151.60
U. S. Surveyor-General's Office,
San Francisco,
July 31st, 1879

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from Aug. 1, 1879, to Aug. 31, 1879, inclusive, 31 days @ the rate of $1,800.00 per annum—$151.60/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, Aug. 31, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and fifty one & 60/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

#33 34102
ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$151.60
U. S. Surveyor-General's Office,
San Francisco,
Aug. 31, 1879.

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from Sept. 1, 1879, to Sept. 30, 1879, inclusive, 30 days @ the rate of $1,800.00 per annum—$146.80/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, Sept. 30, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and forty six and 80/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

No. 65 34102

ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$146.80/100
U. S. Surveyor-General's Office,
San Francisco,
Sept. 30, 1879.

For Sales Prior to and Including 1891

CERTIFICATE OF REDEMPTION OF REAL ESTATE PURCHASED BY THE STATE

ESTIMATE of the amount required to redeem the within described real estate, for the delinquent taxes of 1873, and redeemed on the 10th day of October 1928 in accordance with the provisions of Section Three Thousand Eight Hundred and Seventeen of the Political Code, approved March 2, 1883.

ASSESSED TO E. H. SAWYER & UNKNOWN OWNERS CERTIFICATE NO.____

Description of Real Estate

A tract of Swamp and Overflowed Land situate in Solano County being a part of Mare Island and Survey #34—S O Land, described as follows, to wit:

Fraction in S. E. ¼ of Sec. 10: Twp. 3 N. R. 4 W.)
" " N. E. ¼ " " 15: " 3 N. R. 4 W.) 164½ Acres
" " W. ½ " " 14: " 3 N. R. 4 W.)

Vallejo

Assessed value for the year of sale	$493.00
Delinquent State and County Taxes of 1873	$ 9.36
Delinquent Special School Tax	
Five per cent penalty for delinquency	.46
Delinquent Poll Tax	
Costs	
Interest on the amount of Taxes, from July 1st, 1874	35.56
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
Total Amount Necessary to Redeem	45.38

State of California,
County of Solano.

I, Bert Sheldon, County Auditor in and for said County, State aforesaid, do hereby certify that the foregoing statement contains a full and correct estimate of the amount necessary to redeem the within described real estate, made in accordance with the provisions of Section 3817, Political Code, approved March 2, 1883.

Witness my hand, affixed at Fairfield, this 10th day of October 1928.

BERT SHELDON,
County Auditor.
By.....Deputy.

OFFICE OF THE COUNTY TREASURER,
COUNTY OF SOLANO

RECEIVED OF HEIRS of E. H. SAWYER, Redemptioner, FORTY FIVE and 38/100 DOLLARS, in lawful money of the United States, upon redemption of the within described real estate under the provisions of Section 3817 of the Political Code, approved March 2, 1883.

Witness my hand this 10th day of October, 1928.

GEORGE WENIGER,
County Treasurer.
By Trainor, Deputy.

RECEIVED OF HEIRS OF E. H. SAWYER, Redemptioner, a copy of the within estimate, certificate and receipt, this 10th day of October 1928.

BERT SHELDON,
County Auditor.
By.....Deputy.

2787-S.
U. S. v. O'Donnell, et al.
Defts' Ex. No. I for Iden.
8/5/31.
J. A. S., Deputy Clerk.

SHERIFF'S DEED

Isaac Hobbs, Sheriff of	Dated 3rd Dec. 1870
Solano County, Cal.,	Rec. 3rd Dec. 1870.
—to—	In L-1 Deeds, Page 423.
Edwin H. Sawyer.	$2.50 U. S. I. R. Stps.

Whereas, by virtue of a writ of execution issued out of and under the seal of the District Court of the Fourth Judicial District of the State of California, tested the 21st day of March 1870, upon a Judgment recovered in said Court on the 18th day of January 1870 in favor of Isaiah Hanscom, Plaintiff and against Thomas H. Heermans Defendant to the said Sheriff directed and delivered, commanding him that out of the personal property of said Judgment debtor in his County, he should cause to be made certain moneys in the said writ specified and if sufficient personal property of the said Judgment debtor could not be found then he should cause the amount of said Judgment to be made out of the real property belonging to said Judgment debtor on the 18th day of Jan. 1870 or at any time afterwards. And whereas because sufficient personal property of the said Judgment debtor could not be found whereof the said Sheriff could cause to be made the moneys specified in said writ, the said Sheriff did

in obedience to said command levy on, take and seize all the right, title, interest and claim which the said Judgment debtor so had to the lands, etc., hereinafter particularly set forth and described, with the appurtenances and did on the 16th day of April 1870, sell all the right, title, interest and claim of the said Judgment debtor in and to the said premises at public auction in front of the Court House door in the Town of Fairfield in said County of Solano between the hours of nine in the morning and five in the afternoon of that day, namely at 12 o'clock noon, after having first given due notice of the time and place of such sale according to law, at which sale, all the right, title, interest and claim of the said Judgment debtor in and to the said premises were struck off and sold to the said second party, for the sum of $2110. The said second party being the highest bidder and that being the highest sum bid for the same, whereupon the said Sheriff after receiving from said purchaser the said sum of money so bid as aforesaid gave to the said second party such certificate of said sale as is by law directed to be given, and a duplicate of such certificate was duly filed by the said Sheriff in the office of the Recorder of the County of Solano.

And whereas, the time allowed by law for the redemption of said property has expired without such redemption having been made,

Does grant, bargain, sell, convey and confirm unto the said second party, etc., all the right, title, interest and claim which the said Judgment debtor,

Thomas H. Heermans had on the said 18th day of January, 1870 or at any time afterwards, or now has in and to all those certain lots, etc., of land, situate, etc., in Solano County, Cal. and bounded and particularly described as follows, to-wit:

(Being property not under search.)

Also, an undivided one seventh (1/7) of 164.55 acres of land on, or adjoining Mare Island in Solano County, Cal., and described in the Patent and Solano County Records, to which reference is hereby made, as follows, to-wit:

The South fractional half of the South East quarter of Section Number 10. The north east fractional portion of the North East quarter of Section number 15, The South West fractional portion of the North West quarter of Section number 14, and the North East fractional portion of Section number 14, lying and being between San Pablo and Napa Bays, and being in Township number 3 North of Range 4 West of Mount Diablo Base and Meridian and conforming to the United States Survey, now standing on Solano County Records in the names of Charles A. Secor, James F. Secor, R. Moody, Isaiah Hanscom, and William A. Heermans.

(And other property not under search.)

Together with, etc.,

To have and hold, etc.,

In Witness Whereof, etc.,

S. S. & D. in the Presence of

[L. S.] ISAAC HOBBS,

Sheriff of the County of Solano,

State of California.

Acknowledged: 3rd Dec. 1870. By Isaac Hobbs, Sheriff of Solano County, Cal. (L. S.) Before L. C. Hays, Notary Public, in and for Solano County, Cal.

Mr. PECKHAM, continuing: Also as part of Exhibit "W", we offer Defendants' Exhibit "I" for identification, also the certificate of redemption of real estate purchased and identified by Mr. Burke at the last hearing, redemption from Tax Sale for delinquent taxes of 1873, assessed to E. H. Sawyer and unknown owners.

(The documents were attached to "Plaintiff's Exhibit W",) subject to the same objection heretofore made and overruled and exception.

Mr. PECKHAM: We offer also a copy of the Sheriff's deed to EDWIN H. SAWYER, under date of 1870, recorded in L-1 of Deeds, Page 423 of the Records of Solano County, which we ask to be admitted as part of Government's Exhibit "W".

TESTIMONY OF MARY M. DOYLE.

A witness for Plaintiff.

I am a representative of the City and County Library in San Francisco and was subpoenaed to and here produce the files of the Alta-California for the month of October, 1877, which is the only one we have for that month. [250]

Mr. PECKHAM: I offer in evidence a certified copy of the record and map from the case of the

United States vs. Pacheco, in the Supreme Court, showing two of the islands in the Dunbarton Hills, the Ceritos, at Dunbarton, cut off by navigable streams, as the record shows, from the main land, and further, that the final survey, as established, blotted out the swamp and overflow.

Mr. KELBY: We object to the introduction of that document on the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach the patent of the United States to California, and equally the patent of the State of California, Darlington and further an attempt to vary the description contained in the conveyance from Aspinwall, et al., to the United States, introduced in evidence in this case.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit X".)

PLAINTIFF'S EXHIBIT X.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

The United States vs. Pacheco

101 came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed. Feb. 20th.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-nine.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Endorsed: Filed August 9, 1860.

W. H. CHEVERS, Clerk.

102 Petition of U. S. att'y, and affidavit to return and reform survey.

U. S. dist. court, nor. dist. of Cal.

Pacheco and Alviso
vs. No. 119.
The United States.

The surveyor general of California has surveyed the ranch claimed in the above-entitled cause. On the 20th of November, 1860, he made his first publication, giving notice to that effect. The United States are interested in said survey for the reason that the same is erroneous in the respect that it includes public land, and is in other particulars not conformable to the grant or decree in said cause.

The United States, by Calhoun Benham, their district attorney, pray the survey may be ordered into court and reformed.

CALHOUN BENHAM,
U. S. Att'y.

The United States district court for the northern district of California.

The United States, appellants, in the matter
103 of the survey of the "Potrero de los Serritos," claimed by and decreed to Thomas Pacheco and Augustin Alviso. No. 119.

City and County of San Francisco, ss:

On this 14th day of December, A. D. 1860, personally appeared before me, Cutler McAllister, U. S. commissioner, Daniel M. Salmon, who, being duly sworn, deposes and says as follows:

First. That deponent is a resident of Alameda county, State aforesaid, and a citizen of the United States.

Second. That this deponent has resided permanently for and during the last six and one-half years upon a small island of land in the bay of San Francisco, in the township of Washington, in said Alameda county, containing about seventy acres.

Third. That one Thomas Nelson has also resided upon another adjacent island, similarly situated, for and during about four years, containing about eighty acres.

Fourth. Both of said islands are entirely cut off and separated from the main land by the waters of the bay of San Francisco.

Fifth. That said ranch has been divided
104 and partitioned between said Pacheco and Alviso some several years since; that by such division and segregation that portion of the said

ranch to which said islands are adjacent fell to and became the undivided share and interest of said Augustin Alviso.

Sixth. At the time of and always since said partition (until very recently) said Alviso has uniformity declared and published that said two islands were not embraced in his claim of his said share of said ranch, nor in the original grant, and that he had no claim to or interest in the same; and this deponent, upon reliable information, avers that said islands are not within the limits of said original grant, but that the same are public lands of the United States.

Yet the surveyor general, by his deputy, has caused said ranch to be surveyed, and has embraced within the boundaries thereof said two islands.

It is alleged for error that said surveyor general should not have so embraced said islands in his said survey, which survey has been duly returned and approved by said surveyor general.

D. M. SALMON.

105 Subscribed and sworn to before me this 14th day of Dec'r, A. D. 1860.

[Seal] CUTLER McALLISTER,
U. S. Com.

Endorsed: Filed Dec. 17, 1860.
W. H. CHEVERS, Clerk.

Order to return survey.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the 17th day of December, in the year of our Lord one thousand eight hundred and sixty.

Present: The honorable Ogden Hoffman, district judge.

The United States	In land cases.
v.	District court No. 119.
Tomas Pacheco et al.	Land com. No. 258.

And now at this day, on application of Calhoun Benham, attorney for the United States, it is ordered that the surveyor general of the United States for California return into this court, on or before Wednesday, the second day of January, A. D. 1861, his official survey and plat of the land finally confirmed in the above-entitled cause, known as "Potrero de los Cerritos," and situated in the county of Alameda, in said district. And it is further ordered that the United States marshal for this district serve upon the said surveyor general, without delay, a certified copy of this order, and make due return hereon.

Endorsed: Served personally by copy on J. W. Mandeville, U. S. surveyor general for Cal'a.

P. L. SOLOMON,
U. S. Marshal,
By L. D. SOLOMON,
Deputy.

San Francisco, December 17th, 1860.

Returnable January 2nd, 1861.—Issued December 17, 1860.—Filed December 18, 1860.

W. H. CHEVERS, Clerk.

107 Monition.

United States of America,

Northern District of California, ss:

The President of the United States of
[Seal] America to the marshal of the United States for the northern district of California, greeting:

Whereas objection has been made to the official survey and location of the land finally confirmed in case No. 119, to Tomas Pacheco et al., known as "Potrero de los Cerritos," and situated in the county of Alameda, in said district:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to give due notice to all parties having or claiming to have an interest in such survey and location, that they be and appear before the district court of the United States for said district, sitting in land cases, on or before Wednesday, the 2nd day of January, A. D. 1861, at 11 o'clock a. m., (if that day shall be a day of jurisdiction, and if not, on or before the next Wednesday thereafter,) then and there to intervene for the protection of such interest, or their defaults will be taken. And what you shall have done under this writ do you

108 then and there make return thereon.

Witness the Hon. Ogden Hoffman, judge

of said court, at San Francisco, in said district, this 17th day of December, A. D. 1860.

W. H. CHEVERS, Clerk

Endorsed: The within monition was received by me on Monday, the 17th day of Dec'r, 1860, and in obedience thereto I have given due notice as therein commanded, by causing the publication of said notice for three consecutive Wednesdays, in the San Francisco Herald, commencing on the 19th day of Dec'r, 1860; and for two consecutive Saturdays in the "Alameda Co. Gazette," a paper published nearest the land, commencing on the 22nd day of Dec'r, 1860.

Dated San Francisco.

————————, U. S. Marshal.

Returnable January 2nd, 1861.—Issued December 17, 1860.—Filed January 2nd, 1861.

W. H. CHEVERS, Clerk.

109 Order on return of motion.

At a stated term of the district court of the United States of America for the northern district of California, held at the courtroom in the city of San Francisco, on Wednesday, the second day of January, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable Ogden Hoffman, district judge.

The United States v. Tomas Pacheco et al. — In land cases.— District court No. 119.— Land com. No. 258.

And now at this day, the United States marshal having made return upon the monition heretofore

issued in this cause, that he had given due notice as therein commanded, on motion of C. Benham, attorney for the United States, proclamation was made that all parties having or claiming to have an interest in the survey and location of the land finally confirmed in the above-entitled cause, appear and intervene for the protection of such interest, Calhoun Benham, U. S. att'y, appeared for the United States, and Johnson and Rose and John J.
110 Williams appeared for the claimants, and no other party appearing, whereupon it is ordered that the default of all parties not appearing as aforesaid be, and the same is hereby, entered.

Endorsed: Filed January 2, 1861.

W. H. CHEVERS, Clerk.

(Here follows plat; see final decree.)

111 Order allowing U. S. att'y ten days farther time to except to survey.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

Present: the honorable Ogden Hoffman, district judge.

The United States

v. No. 119.

Tomas Pacheco et al.

And now, at this day, on motion of Mr. Benham, U. S. att'y it is ordered by the court that he have

ten days farther time to file exceptions to survey.
Endorsed: Filed March 4, 1861.

W. H. CHEVERS, Clerk.

112 Order opening default and allowing H. P. Jones to intervene.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

Present: the honorable Ogden Hoffman, district judge.

The United States
v. No. 119.
Tomas Pacheco et al.

And now, at this day, on motion of Wm. Carey Jones, esq., it is ordered by the court that the default heretofore entered in this cause be, and is hereby, opened, so far as to allow H. P. Jones to intervene for his interest herein.

Endorsed: Filed March 4, 1861.

W. H. CHEVERS, Clerk.

113 Exceptions of U. S. to survey.

District court of the United States in and for the northern district of Calif'a.

The United States
v. Potrero de los Serritos.
Thomas Pacheco et al.

Exceptions to survey.

And now comes the United States, and by their attorney, Calhoun Benham, excepts to the survey of the land claimed herein, made under final decree, the field-notes of which were approved by the U. S. surveyor gen'l for California, on the day of , 1860; and a certified copy of the plat whereof was filed in this court, pursuant to its order, on the 28th day of January, 1861.

And the United States makes the following exceptions to said survey:

1st: That said surveyor is erroneous, in this: that in running the west line of said claim upon the Bay of San Francisco, at least two leagues of salt land are left out of, and excluded from, the boundaries of said claim, thereby, in order to obtain the amount confirmed by the decree, taking and embracing two leagues on the east and interior of good arable land.

2nd. That in running said west line upon
114 said bay, after excluding said two leagues of salt land, the surveyor run said line so as to embrace and include about one league of salt land, and thereby taking in two islands located far below high tide water, and which are surrounded by the waters of said bay.

Therefore the United States pray that said survey be set aside for the reasons above set forth, and for an order directing said United States surveyor general to cause a resurvey of said land, in conformity to the interest and meaning of said final decree, so as to embrace all or none of said salt land, so overflowed and surrounded by the tide-waters of said bay.

CALHOUN BENHAM,
U. S. Att'y.

Endorsed: Filed March 9, 1861.
W. H. CHEVERS, Clerk.

115 Dep. of Louis Cammann on part of U. S.

In the district court of the United States for the northern district of California.

The United States v. Thomas Pacheco et al. In land cases.— Dist. court No. 119.— Land com. No. 258.

Be it remembered, that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner, duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared Louis Cammann, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land

claims in the State of California, who being duly sworn, testified as follows:

Present: U. S. att'y for U. S., S. Johnson, esq., and W. Carey Jones, esq., for claimants.

116 Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. Louis Cammann; 33 years; Union City, Alameda county; keeper of saloon.

2. Do you know Augustin Alviso, and how long have you known him, if yea?

Ans. I know him by sight, and have known him in this way since 1852.

3. Did you know Tomas Pacheco in his lifetime?

Ans. Yes.

4. Look upon the official plat of the survey filed in this case, and state if you know the two islands or knobs, marked thereon "D. E. Salmon" and "Wm. Brown?"

(Claim'ts object to the use of the term "island" as leading, and because there is nothing on the official plat representing island.)

Ans. I do recognize them.

117 5. How long have you known them?

Ans. Since 1852.

6. Did you ever live on either of them; if yea, on which one?

Ans. The one marked "D. E. Salmon" on the official plat.

7. When did you first occupy it?

Ans. In October, 1853.

8. How long did you remain there?

Ans. Till the latter part of January, 1854.

9. To whom, if anybody, did you surrender the possession?

Ans. I delivered such possession as I had to Wm., Daniel Salmon's brother.

10. How long have you known Daniel Salmon to occupy this knob?

Ans. He first went there in the fall of 1854.

11. Does he now reside on it?

118 Ans. Yes.

12. Have you ever known him to abandon it?

Ans. I knew he was absent at one time, leaving it in charge of some one. He did not take his house away.

13. From your personal knowledge, do or do not ordinary high tides flow around the two knobs spoken of?

(Objected to as immaterial, irrelevant, and leading.)

Ans. They do by the way of the sloughs making into the land.

14. In ordinary high tides can you go around these knobs with a common row-boat?

(Same objection.)

Ans. I went around it with a skiff.

15. Could you go from the knob on which Salmon now lives, and did live in the fall of 1854, upon the main land without using a boat, before the bridge was built?

119 Ans. You could not without jumping the slough which could be done.

(The whole of the foregoing deposition objected to by claimants as being immaterial and irrelevant.)

Deposition closed.

LOUIS CAMMANN.

Sworn and subscribed to before me this 4th day of April, A. D., 1861.

BLAIR LAURIE,
Special Commissioner.

Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

Dep. of J. G. Chipman on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Thomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 4th day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United
120 States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared John S. Chipman, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court, under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.; Sidney Johnson, esq., for claimants.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. John S. Chipman; of lawful age; San Leandro, Alameda county; attorney-at-law.

2. Are you acquainted with the claimants in this case, or either of them?

Ans. I first knew Agustin Alviso in 1852, and have known him ever since, and knew Pacheco at the same time, and up to the time of his death.

121 3. State if you ever had any conversations with the claimants, or either of them, or ever heard any conversation of them, or either of them, being present yourself, concerning the boundaries of the rancho in question. If so, state what they were, and when and where you heard them.

(Objected to as irrelevant and hearsay; also, that the claimants had granted their interest in that part of the claim which is the subject of contention, and could not be heard themselves against their own could not be heard themselves against their own grant.)

Ans. In 1853 or 1854, I think in 1853, I was standing upon the northern extremity of the cerritos, upon the slough that divided the cerritos from the "knob," marked on the official plat "D. E. Salmon," with Augustin Alviso and others. I proposed to him to cross the slough to do some business upon this Salmon "knob." He said, "No; this slough is my boundary. I don't claim the island." I was replevying wild oats that had been cut upon the

cerritos, and, as I supposed, upon this Salmon
122 "knob." I was replevying for Alviso. I was replevying this wild oats on the ground that it had been cut upon his ground by trespassers. I was acting as attorney for Alviso in connection with the sheriff's officers. Having replevied the oats cut upon the northern extremity of the cerritos, and seeing some had been cut upon this "knob," I proposed to cross the slough to take the oats cut upon the "knob" marked, on the official plat, "D. E. Salmon;" and it was then and there that Alviso made the remark spoken of in the first part of this answer.

4. State the character of the two pieces of land delineated upon the official plat of the survey, filed in this case as hills—one marked "Wm. Brown," the other "D. E. Salmon"—relative to the surrounding lands and the tides of the bay.

Ans. These two pieces, marked upon the plat "D. E. Salmon" and "Wm. Brown," are two pieces of up dry land, containing each about from 60 to 80 acres. I should think Salmon's piece contained 60 or 70 acres; the other, I should think, con-
123 tained about 90 acres.

They are surrounded by sloughs and salt marsh each, and whether the high tides flow around both or either of them, I am unable to say.

On the bay side of the line from the mouth of the Alameda creek to and along the Cerritos, and between that line and the main waters of the bay, there is at least one league of salt marsh. On the

side of the main land, and adjacent to and about these two pieces spoken of, and within the line of survey, there are two square miles of salt marsh altogether.

(The whole of the foregoing testimony objected to on the ground of its being immaterial and irrelevant.)

JOHN G. CHIPMAN.

Sworn and subscribed to before me this 4 day of April, A. D. 1861.

BLAIR LAURIE,
Special Com'r.

Endorsed: Filed April 4, 1861.
W. H. CHEVERS, Clerk.

124 Dep. of Thos. Canfield on part of the U. S.

In the district court of the United States for the northern district of California.

The United States v. Thomas Pacheco et al. — In land cases.— Dist. court No. 119.— Land com. No. 258.

Be it remembered that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared Thomas Canfield a witness produced in behalf of the United States in the above-entitled

cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.; Sidney Johnson, esq., and W. Carey Jones, for claimants.

Questions in behalf of the United States.

125 Question 1st. What is your name, age, residence, and the occupation?

Ans. Thomas Canfield; 41 years; Livermore's valley, Murray township, Alameda county; herding cattle and sheep.

2. Do you know Agustin Alviso; and if so, how long have you known him?

Ans. I do; and have known him since 1857.

3. Do you know what is called the Pacheco and Alviso claim?

Ans. I do not.

4. Look upon the official plat of the survey filed in this case, and state if you know the places thereon marked "D. E. Salmon" and "Wm. Brown."

Ans. I do know them, and have lived on one—"Salmon's"—and have been on the other.

5. When did you live on the one you speak of as Salmon's?

Ans. In 1857.

6. At whose instance, if anybody's, did

126 you go there?

Ans. I went there at Mr. Salmon's invitation.

7. Was he then living on that island or knob?

(Objected to, because the use of the term island is leading.)

Ans. Yes.

8. Had he a house on it, and family?

Ans. He had a house there, but his family was not there at that time.

9. Did you ever hear Agustin Alviso say anything, if so, what, in relation to his claim to the "knobs" before referred to?

(Objected to, because Augustin Alviso had parted with his interest in all that part of the claim referred to in the question before witness knew him, and could not be heard himself against his own grant; and further objects because the testimony is hearsay.)

Ans. No, sir; I always supposed it to be 127 government land.

10. After you knew the "knob," and Augustin Alviso, did he, or did he not, suggest to you to squat on it?

(Same objection as to what Alviso said, and as leading.)

Ans. Yes; he wanted me to squat on the one marked on the official plat "Wm. Brown."

11. On that occasion what did Alviso say?

(Objected to as being cross-examination, and also for same reasons that the preceding questions were objected to.)

Ans. He said I could go and squat on it and no one would trouble me.

12. On that occasion, or any other, did he speak of the boundary of his land or claim on the side of the "knobs?"

(Same objection.)

Ans. I don't recollect—it has been so long ago.

Deposition closed.

THOMAS CANFIELD.

Subscribed and sworn to before me this 4 day of April, A. D. 1861.

BLAIR LAURIE,
Special Commissioner.

128 Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

Dep. of Emery Munzon on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared E. Munzon, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court under the acts

of Congress to ascertain and settle the private land claims in the State of California, who, being
129 duly sworn, testified as follows:

Present: U. S. att'y for the U. S.; S. Johnson, esq., for the claimants, Wm. C. Jones, for claimants.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. Emery Munzon; 38 years, Washington township, Alameda county; farmer.

2. How long have you resided there?

Ans. Since the 7th July, 1852.

3. Do you know Agustin Alviso?

Ans. I do.

4. How long have you known him?

Ans. Since January, 1853.

5. Did you know Thomas Pacheco in his lifetime?

Ans. I did.

6. When did you first know him?

Ans. In January, 1853.

130 7. Is he dead?

Ans. He is.

8. How long a time ago did he die?

Ans. I am not positive; 3 or 4 years ago.

9. Where did he reside in his lifetime?

Ans. In Washington township.

10. Where does Agustin Alviso reside?

Ans. In Washington township.

11. Do you know what is called the Alviso and Pacheco claim, in that township?

Ans. I do.

12. Does Alviso reside upon a portion of that claim now?

Ans. He does.

13. Did Tomas Pacheco, in his lifetime, reside upon a portion of it?

Ans. He did.

14. Have you at any time, resided with
131 Augustin Alviso, or upon his part of the claim?

Ans. I never did.

15. Have you any knowledge of a division of the claim between Pacheco and Alviso, verbal or otherwise?

(Objected to because a verbal division would be null, and parol evidence would not be the best proof of any other division.)

Ans. I have seen papers of a division between Alviso and Wm. Carey Jones and T. B. Strode.

(Answer objected to as not being the best evidence; also objected to by W. C. Jones.)

16. Did you ever hear a verbal agreement between Alviso and Pacheco in reference to a division of the claim?

Ans. I never did.

17. Did you at any time have a conversation with Agustin Alviso, touching the boundaries of the claim between his residence and the mouth of Alameda creek?

(Objected to because it is hearsay evidence,
132 and because Alviso, the person referred to, parted with his interest in the claim upon that side before the witness became acquainted with him,

and that grantor cannot be heard to the prejudice of his own grant.)

Ans. I have had conversations with him in regard to the boundaries of his grant, but never heard him say anything about the mouth of Alameda creek in connection with the boundaries.

18. Did you ever hear him say whether the islands, as they appear upon the official plat of the survey filed in this case, (the points to which I allude are marked "Wm. Brown," and the other "D. E. Salmon,") were or are within the boundaries or not?

(Objected to for the same reason as to ques. 17; and also because the official plat of the survey does not show that any islands are embraced in it.)

Ans. I never heard Alviso say he claimed them as being within his boundaries. I heard him say that he ordered a Peruvian to squat on one of 133 them—the one marked "Wm. Brown."

(Objected to as incompetent and irrelevant.)

19. Are you well acquainted with those islands or knobs, and the surrounding land and waters?

(Objected to because the official plat does not show that there are any islands embraced within the boundaries.)

Ans. I am.

20. How long have you known that locality?

Ans. I have known it since 1853.

21. Does or does not high tide water flow around the knobs above referred to?

(Objected to as leading.)

Ans. It does.

22. Are you acquainted with the slough laid down on official plat of survey filed in this case; passing by the knob marked "D. E. Salmon?"

Ans. I am.

23. About what is its average width along
134 Salmon's "knob?"

Ans. About 200 feet.

24. How far, if at all, above knob marked "D. E. Salmon" is that slough navigated by trading vessels, by its courses?

Ans. I could not say; about ½ or ¾ of a mile on a direct line from the knob to the embarcadero.

25. How much, by the best estimate you can make, salt or marsh ground (looking on the official plat of survey) lies between the line of the survey that runs upon the bay side of the "knobs" and the main waters of the bay?

(Objected to because it does not appear that witness is an expert or competent to judge of the matters submitted to him in the question.)

Ans. About 4 square miles.

26. How much, by the best estimate you can make, (looking on the plat aforesaid,) salt or marsh land lies inside of the "knobs" in a direction of Union City and Alvarado?

(Same objection.)

Ans. About 2 square miles.

135 27. Looking upon said plat, how much, if any, salt or marsh land lies between the cerito and the main waters of the bay?

(Same objections; also objected to because the plat does not show where the main waters of the bay are.)

Ans. From 3 to 4 square miles.

Cross-examination by claimants.

28. You state you live in Washington township. Say in what particular part of it; describe the locality.

Ans. Two miles west of Centerville, near the residence of Agustin Alviso.

29. How long did you live in that locality?

Ans. Since the 1st day of January, 1853.

30. Where did you live previous to that time?

Ans. Near Maury's landing—about 3 miles south of my present residence, a little east of south—on the land marked on official plat "Lands of the
136 ex-mission of San Jose."

31. You state, in answer to ques. 15, that you have seen papers of a division between Alviso and Wm. Carey Jones and T. B. Strode. State the character of those papers, their contents, in what manner they were executed, and what they describe?

Ans. They were papers in Spanish, recorded in Santa Clara county, stating that a portion of the rancho known as Cerritos, lying south of a callado or ditch and a sausal or willow swamp, should be the portion pertaining to Augustin Alviso. I can give the boundaries nearly word for word as the papers described them. From the willow swamp, where the ditch ends, the line to run to a point in the sausal or willow swamp, in direction to Union

City; from this point of this willow grove in the nearest direction to the high hills; from the foot of the hills along the edge of said hills to the bay of San Francisco, leaving all said hills for the benefit of said Augustin Alviso; thence along said bay to the mouth of the Arroyo Alameda; then up said arroyo to the place of beginning.

I think that the papers were acknowledged before Murphy. I think that Alviso and Strode were
137 the ones that signed the paper. I think Strode signed for W. Jones as his attorney.

32. Are you familiar with the Spanish language?

Ans. Sufficiently to read and converse on ordinary business.

33. Please repeat in Spanish the boundaries you have described in answer to question 31.

Ans. Empezando á la punta del vallado cerca onde se junta con el Arroyo de Alameda cerca la casa de Don Tomas Pacheco siguinedo dicho vallado hasta que junta con el sauzal, donde se conclude: de alli, si sigue á la punta del sauzal en direccion á Union City, de este sauzal en direccion mas corta á las lomas altas; de alli se sigue la orilla de dichos lomas á la bahia de San Francisco, y por la orilla de dicho bahia á la boca del Arroyo Alameda, y arriba por el Arroyo Alameda hasta se llegue al vallado donde se empezo.

138 34. Did you ever see the original of those papers you have described, and when, if so?

Ans. I saw a paper in the possession of Alviso, purporting to be the original, somewhere from 3 to 5 years ago.

35. How do you know the paper was recorded in Santa Clara county?

Ans. Alviso sent me to get a certified copy of the record of it from the clerk of the county of Santa Clara. I got it there.

36. State the name of the office of the person who gave you that certified copy, and the date of it, and where it is now?

Ans. I think his name was Healey. He was the county clerk in the city of San José. It was dated at the time he delivered me the copy, some 3 to 5 years ago. I delivered it to Augustin Alviso at that time. I don't know where it is now.

37. Have you ever had any interest in any 139 lands either which this survey would favor or operate against?

Ans. No; I have not, nor ever had.

38. What consideration did Agustin Alviso pay you for going to San José and procuring the certified copies that you speak of?

Ans. Not a cent.

39. Were you promised, or do you expect, any consideration for it?

Ans. He promised to pay me for my day's work, and the cost of the trip.

Deposition closed.

EMERY MUNZON.

Subscribed and sworn to before me this 4th day of April, A. D. 1861.

BLAIR LAURIE,
Special Commissioner.

Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

140 Intervention of H. P. Jones

In the district court of the United States for the northern district of California.

The United States

v. No. 119.

Thomas Pacheco et al.

Northern District of California, ss:

H. P. Jones, being sworn, says that he is the owner of a certain portion of the said rancho, embraced within and designated by certain boundaries, a large portion of which is embraced within the limits of the survey made of said rancho by the surveyor general of the United States, containing by estimate one thousand acres, more or less; that he holds said premises by virtue of mesne conveyances from the original grantees and confirmees of said rancho, Thomas Pacheco and Augustin Alviso, and that for more than two years last past he has been in quiet and peaceable possession of said premises under his said title.

Petitioner further deposes and says, that he has an interest in the survey of said rancho as
141 returned into this court by the surveyor general of the United States, and prays that he may intervene herein for the protection of his said interest as above mentioned.

H. P. JONES.

Sworn and subscribed to before me this 10th day of April, A. D. 1861.

W. H. CHEVERS, U. S. Com.

E. A. LAWRENCE,
And WM. CAREY JONES,
Att'ys for Petitioner.

Endorsed: Filed April 10, 1861.
W. H. CHEVERS, Clerk.

Dep. of E. H. Dyer on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 11th day of June, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United
142 States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared E. H. Dyer, a witness produced in behalf of the United States, in the above-entitled cause, now pending in said court, under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. E. H. Dyer; 39 years; Alvarado, Alameda county; county surveyor of Alameda.

2. Have you made a map or chart of the point land lying between Alameda creek and the Bay of San Francisco?

Ans. I have.

3. Did you make so much map or chart as a surveyor?

Ans. I did.

142. 4. Is the exhibit marked E. H. D., attached to this deposition, the one made by you and above referred to, and is it a correct delineation of the lands referred to?

Ans. It is one, and is substantially correct.

5. Is the line on this plat, which purports to be the westerly line of the rancho of the Cerritos on said map, a true representation of that line as laid down on the plat of the U. S. survey?

Ans. It is.

6. Do you know if the knobs, which appear upon said exhibit like islands, are surrounded by high tide-water?

Ans. They are marked on my exhibit, Peruvian and Hunter island, and they are surrounded by high tide-water.

7. How much salt land lies between the westerly line of the survey of said rancho, and the main waters of the bay?

Ans. Between 7 and 8 square miles.

144. 8. How much salt land of the same character lies between said westerly line and the Alameda creek?

Ans. Between 3 and 4 square miles.

9. Does the black line marked upon Exhibit E. H. D. show the true line between the salt and dry land?

Ans. It was not all made by actual survey; part of it was, and the rest from observation, and I think it is substantially correct.

10. Do you know of an artificial ditch from the Alameda creek to the willows, or at a point by Patterson's residence?

Ans. I know there is such a ditch.

11. Where does it leave Alameda creek, with reference to Pacheco's old residence, and in what direction from that point does the ditch run. And does it cross the old mission road from Alvarado?

Ans. Judging from its course, I should think it left Alameda creek near the house. It runs
145 in a westerly direction, crossing the road from Alvarado to the mission to the willows, and I should think it would strike about Patterson place at the willows.

12. Do you know the place where the U. S. surveyor has located the line of this rancho in the direction of Santa Clara?

Ans. I do not.

13. Do you know the serpentine indentation in the land from Mayhew's landing, leading towards the Alameda creek, passing through Centreville?

Ans. I do.

14. Is that a natural or artificial indentation in the land?

Ans. It has the appearance of being natural, not artificial—produced apparently by an overflow of the Alameda creek.

15. Can you say whether what purports to be the upper line in the direction of Santa Clara,
146 delineated on the official plat of the survey in this case, represents a natural or artificial ditch?

Ans. I should think it represents a natural ditch.

Deposition closed.

E. H. DYER.

Subscribed and sworn to before me this 11th day of June, 1861.

BLAIR LAURIE, Com'r.

Endorsed: Filed 11 June, 1861.

W. H. CHEVERS, Clerk.

(Here follows Exhibit E. H. D., annexed to dep. of E. H., Dyer, page 146.)

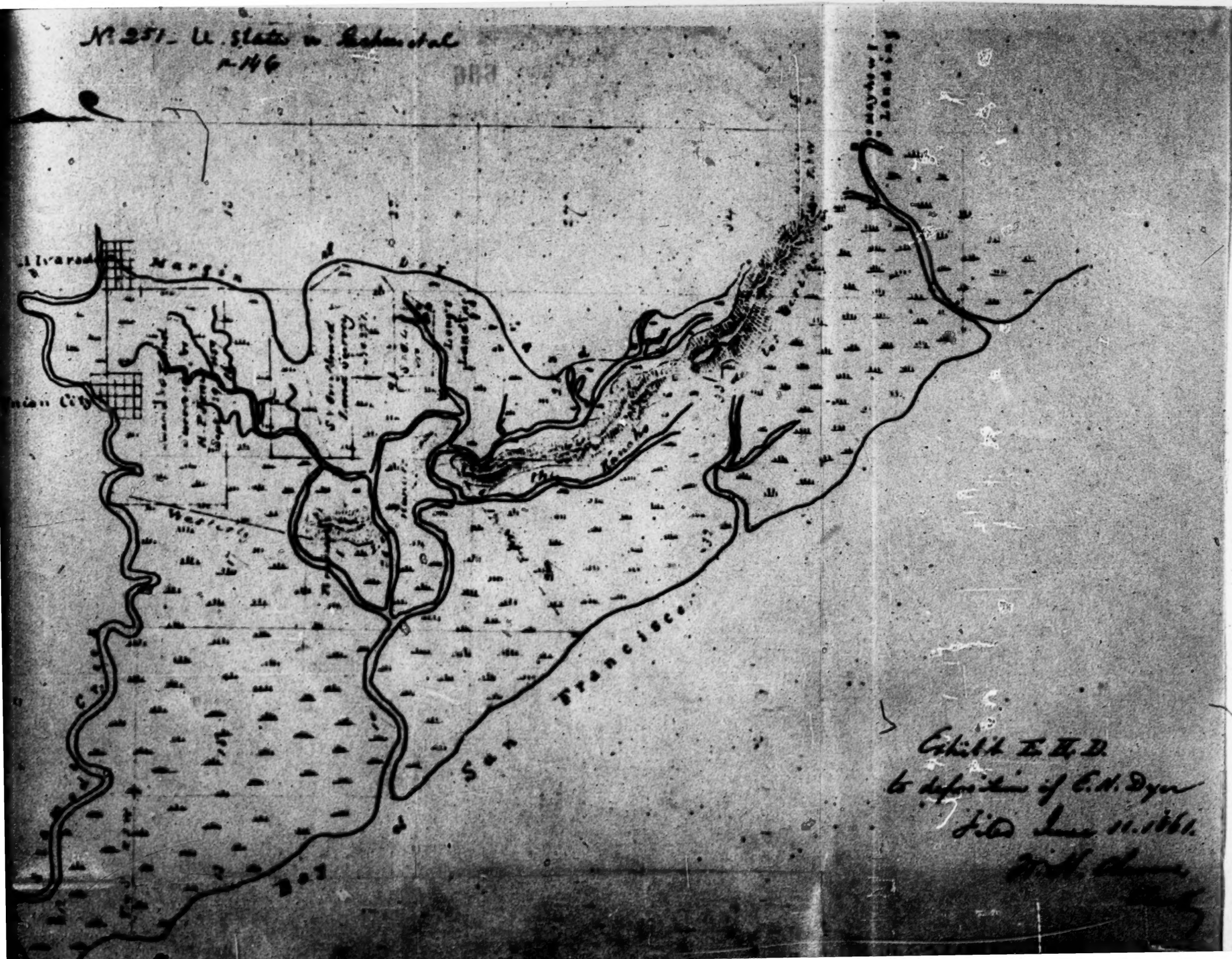
147 Dep. of Wm. J. Lewis, on part of claim'ts.

In the district court of the United States for the northern district of California.

The United States — In land cases.—
v. — Dist. court No. 119.—
Tomas Pacheco et al. — Land com. No. 258.

Be it remembered, that on this 28th day of April, A. D. 1862, at the city of San Francisco, in the

district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil


No. 251 - U. States vs Rockwell et al
P-146
Alvarado
Marsh
Union City
San Francisco
Exhibit U.S.A. D.
to deposition of C.N. Dyer
Feb 11.1961.

causes depending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared William J. Lewis, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: J. J. Williams and Sidney L. Johnson, esq'r's, for claimant, and E. H. Laurence, esq., for Intervenor Jones et als.

148 Questions in behalf of the claimant.

Question 1st. What is your name, age, place of residence, and occupation?

Ans. My name is Wm. J. Lewis; my age is fifty years. I reside in San Francisco, and am by occupation a civil engineer and surveyor.

2. Are you the same Wm. J. Lewis who made the official survey in this case, the plat of which is now before you?

Ans. I am.

3. Was there any difficulty in this case in ascertaining the northern, eastern, and southern boundaries of the ranch, as defined in the original grant and final decree of confirmation?

Ans. There was not. The Alameda creek is a well-known stream, formerly the boundary between Santa Clara and Contra Costa counties, and running from the mountains to the bay. The Sanjon de los Alisos is a wide ditch, running from Alameda creek to a slough on the margin of the swamp
149 lands adjacent to the bay of San Francisco;

it is unmistakably defined on the ground, and is well known to the residents in the vicinity.

4. Upon what principles were you governed in running the western line?

Ans. The boundary, as finally confirmed on the western side, is "the bay of San Francisco," and the contents of the rancho is "about three square leagues." Under the regulations of the land office and the general instructions of the U. S. surveyor general of California, the claimants are entitled to select the specified quantity of land within their boundaries. When I arrived in the order of survey at "post 175," at Beard's Embarcadero, Augustin Alviso stated that he did not desire that I should include any of the swamp land to the westward of the range of hills marked "Los Ceritos," but did wish to include that range. I accordingly ran the line along the western base of that range to "post 211," at the northern end of the hills. The property north of that point, and extending to Alameda creek, was sold several years since to Strode, Jones, and others, whose interest in the survey were represented by Hezekiah P. Jones, brother of Wm. Carey Jones, one of the original purchasers from Pacheco and Alviso. The said H. P. Jones wished to include the two little ceritos to the north and northwestward of the range already mentioned. The line was accordingly run from post 211 to post 212, at the west end of the most eastern of the two ceritos; thence to post 213, at the southern end of the western cerito; thence along its western margin to post 218, at its northwestern end; thence

150

in a direct line to post C. R. 1, the place of beginning, on Alameda creek. I calculated the area of the survey, and finding that there were two thousand seven hundred and four acres less than the area confirmed in this case, (three leagues,) I informed Mr. Jones that he was at liberty to select that quantity of land to the westward of my western lines, and between them and the bay. He said
151 he did not desire the possession of that land, that he considered it of very little value. The land from post 212 to 213 crosses salt marsh of the ordinary character of the salt marshes surrounding the bay. These marshes are genderally at the elevation of ordinary high tides, but are overflowed twice a month, at the new and full moon. The same remark applies to the general character of the line from post 218 to post C. R. 1; but on that line there are some points where ordinary tide passes a little to the eastward of the line, where small sloughs run up into the main land.

5. Are the two small ceritos referred to by you properly called or considered "islands?"

Ans. They are not properly called islands, an island being a tract of land surrounded by water, and these are evidently surrounded by water but a small portion of the whole time.

6. Look upon the diseños in this case marked "18 S. D. K.," and "31, S. D. K.," and ob-
152 serve the slough making up into the main land from the estero, and state with what slough or object it corresponds on the ground.

Ans. On both diseños they are undoubtedly intended to represent the slough which crosses the

western line between posts 211 and 212. This slough extends up a long distance to the eastward, forming in its upper part a sausal or willow swamp. No other between that and Alameda creek extends much if any distance into the higher land.

7. Did you ever make a prior survey of this land? If so, state when, for whom, and for what purpose.

Ans. I made a survey of Strode and Jones's purchases from Alviso in 1853. Their purchases did not embrace a portion of the land to the eastward, which was leased by Beard and Horner of Alviso, but I made a survey of the whole of the western part, extending westward of the lines from post 212, and the lines from post 212 to C. R. 1, and extending from these lines to the margin
153 of the bay, and including the two little ceritos. This survey was of Strode and Jones's portion of the ranch, and Mr. Alviso was present while I was making the survey along the northern margin of the sausal until I came running westerly to the slough. The eastern boundary of one part of the Jones and Strode survey was a ditch running from the Alameda creek, near Tomas Pacheco's house, to the sausal, excepting a small reservation on the creek; the remaining portion of their purchase was a tract bounded on the westward by the ditch, on the south by the road leading from Union City to the mission of San José, and on the north and east by the boundaries of the rancho.

The latter part of the answer, commencing with the words "The eastern boundary of one part of

the Jones and Strode survey," etc., was in answer to a question verbally propounded by Mr. Lawrence, counsel for int'r Jones et al.

Cross-examination. Deposition closed.

WM. J. LEWIS.

154 Sworn to and subscribed April 28, 1862, before me.

W. H. CHEVERS, U. S. Com.

Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

Dep. of Jas. T. Stratton, on part of claim'ts.

In the district court of the United States for the northern district of California.

The United States v. Tomas Pacheco et al. — In land cases, dist. court, No. 119.— Land com. No. 258.

Be it remembered that on this 28th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States,

155 pursuant to the acts of Congress in that behalf, personally appeared Jas. T. Stratton, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress, to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: J. J. Williams, esq., and Sidney L. Johnson, esq., for claimant; and E. A. Laurence, esq., for int'rs Jones et als.

Question 1st. What is your name, age, place of residence, and profession?

Ans. My name is James T. Stratton; I am of lawful age; I reside in Alameda county, and my profession is that of surveyor.

2. Did you ever hold any office in Alameda county; if so, what and how long?

Ans. I was deputy county surveyor from 1853 to 1859, and have been county surveyor for two years, and have also been a U. S. deputy
156 surveyor.

3. Do you know the rancho claimed in this case?

Ans. I do know it well.

4. Look upon the diseñor in this case, marked "18, S. D. K." and "31, S. D. K." and observe the slough making up into the main land from the estero, and state with what slough or object it corresponds on the ground?

Ans. It corresponds on the ground with the slough shown on the copy plat of official survey, filed in this case, crossing eastwardly into the main land, at the southerly side of the cerito, on which is marked "D. E. Salmon."

Cross-examination.

Questions by counsel for intervenors Jones et al.

Ques. 5. State what is the character of the land between the slough last referred to and the beginning post, and designated as marsh land.

Ans. It is of the usual character of the
157 salt marsh land surrounding the bay of San Francisco, and is generally but two or three inches above ordinary high tide, and is only overflowed during spring tides.

6. State the character of the two ceritos, marked Brown and D. E. Salmon, with reference to the main land.

Ans. They are isolated hills, surrounded by the salt marsh above described; they are sometimes called islands, but not properly so, because they are only surrounded by water at the spring tides.

Deposition closed.

JAS. T. STRATTON.

Subscribed and sworn to this 28th day of April, A. D. 1862, before me,

W. H. CHEVERS, U. S. Com.

Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

158 Dep. of Salvio Pacheco, on part of claim't.

In the district court of the United States for the northern district of California.

The United States v. Tomas Pacheco et al. In land cases, dist. court, No. 119.— Land com. No. 258.

Be it remembered, that on this 29th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and

also to take depositions of witnesses in civil causes depending *in civil causes depending* in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared Salvio Pacheco, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows: his evidence being interpreted by Manuel Arrisa, jr., a sworn interpreter.

159 Present: J. J. Williams, esq., and Sidney L. Johnson, esq:. for claimant, and E. A. Laurence, esq., for intervenors Jones et als.

Questions in behalf of the claimant.

Question 1st. What is your name, age, and place of residence?

Ans. My name is Salvio Pacheco; my age is over sixty years; and I reside in the county of Contra Costa.

2. Do you know the rancho claimed in this case, called Potrero de los Ceritos?

Ans. I do.

3. Do you know by whom the original *diseño* was made for Alviso and Pacheco?

Ans. I myself made the *diseño* and petition.

4. From what did the rancho take its name?

Ans. From the "*Rinconado de* Ceritos" and the Arroyo Alameda.

5. Do you know the two small ceritos, rep-
160 resented on the official plat in this case, between the slough and the Alameda creek?

Ans. I do.

6. Do you know whether or not those two ceritos were included in the grant and diseño to Pacheco and Alviso?

Ans. They were in both the diseño and grant, and I think in the petition for the grant.

7. Were the said *ceritos* used and occupied by the original grantees, if so, how?

Ans. Originally they were used and occupied by the mission, and after the petition of Pacheco they were always occupied by Pacheco and Alviso. They were used for the purpose of pasturing hogs, sheep, and cattle, and they contained very good grasses.

Cross-examination waived. Deposition closed.

SALVIO PACHECO.

Subscribed and sworn to this 29th day of April, A. D. 1862, before me.

W. H. CHEVERS, U. S. Com.

161 Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

Dep. of Guillermo Castro, on part of claim't.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 29th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of

ALVARADO
E.C. Smith
C.B. Strody William Carey Jones Esqr 4635 Acres
Thompkins Jones & Strode
1870 Acres
277 Acres
Surveyed April 1851
by William T Lewis
County Surveyor
SAN FRANCISCO
BAY

SUPREME COURT OF THE UNITED STATES

I, Charles Elmore Cropley, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing photostatic pages, numbered from one to fourteen, inclusive, contain a true copy of extracts from the transcript of the record in the case of

The United States, App'ts.,

vs.

Tomas Pacheco, et al.,

No. 251, December Term, 1864, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this first day of April, A. D. 1932.

[Seal] CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.
By REGINALD C. DILLI,
Deputy.

WITNESS continuing: The notice of the completion of the Freeman Survey, published by Surveyor General Robbins, pursuant to Section I of the Act of July 1, 1864, was offered in evidence.

Mr. KELBY: We make the same objection that we have heretofore made.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit Y".)

PLAINTIFF'S EXHIBIT Y

[Endorsed]: Filed May 3, 1932, United States District Court.

Filed: Jun. 18, 1934, United States Circuit Court of Appeals.

Advertisement of the Freeman Survey as it appeared in the Daily Alta California on November 8, 1877, page 4, bottom of Col. 5; and on October 11, 1877, page 2, top of Col. 4.

"U. S. Surveyor-General's Office, San Francisco, Cal., October 10th, 1877.—Notice—

In compliance with the first section of an Act of Congress, approved July 1st, 1864, regulating surveys of Private Land Claims, notice is hereby given that the following survey thereof has been made, viz: Isla de la Yegua or Mare Island, finally confirmed to George W. Bissell and Wm. H. Aspinwall. Surveyed by Jas. E. Freeman, Deputy Surveyor, in July, 1877. Containing 5227 22 100 acres. The plats will be retained in this office, subject to inspection, for ninety days from the date of the first publication hereof. H. G. Rollins, U. S. Surveyor-General.

Oc 11 th 5"

Mr. PECKHAM: I offer in evidence a photostat of the Life of Sawyer from Page 655, History of Solano and Napa Counties, also a letter dated February 12, 1853, from John P. Kennedy, Secretary of the Navy, to Honorable A. H. Stuart, Secretary of the Interior, also letter from John Wilson, the Commissioner of the General Land Office, to

Samuel D. King, Surveyor General at San Francisco, also letter from John Wilson, Commissioner of the General Land Office, to James C. Dobbin, Secretary of the Navy, dated April 30, 1853, also the ap- [251] pointment by H. G. Rollins of James E. Freeman, to make a survey, also the Certificate of Publication of the Notice (Plaintiff's Exhibit Y), also copy of a letter from General Ames to J. A. Williamson, Commissioner of the General Land Office, dated November 5, 1877, also a voucher, No. 99960, dated November 5, 1877.

Mr. KELBY: Same objection as made to the previous exhibit and also on the further ground that the survey, the map of which has just been entered in evidence, has not been shown to have had the approval of the General Land Office or the Interior Department of the United States.

The COURT: Objection overruled and exception.

(The documents were received in evidence as "Plaintiff's Exhibit Z".)

PLAINTIFF'S EXHIBIT Z

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

"B" March 21, 1932

H. E. R.

I hereby certify that the annexed copies of letters, papers, plat and blue print, filed under "Mare

Island" are true and literal exemplifications of the originals and records on file in this office, in my custody.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] (Signed) D. H. PARROTT,
Acting Assistant Commissioner of the
General Land Office.

J. W. Ames,
U. S. Surveyor General

J. Robinson
Chief Clerk

U. S. SURVEYOR-GENERAL'S OFFICE
CALIFORNIA
Commercial St., above Montgomery
(Up Stairs)

Official letters, etc., pertaining to the business of the office, should be addressed to the "U. S. Surveyor-General's Office, Post Office Box No. 2260." Be particular to describe the land you write about, by Section or parts of Section, Township and Range.

San Francisco, Nov. 5th, 1877.

Hon. J. A. Williamson,
Comr. Gen'l Land Office,
Washington, D. C.

Sir:

I have the honor to transmit herewith, tracing for account, also account of Jas. E. Freeman, Dep. Surveyor for surveying Isla de la Gegua or Mare

Island (confirmed to Geo. W. Bissell and Wm. H. Aspinwall) executed under his contract of June 28, 1876, amounting to $404.94 payable from the appropriation for the survey of Private Land Claims in Cala. during the fiscal year ending June 30, 1876.

Very respectfully,

J. W. AMES,

U. S. Sur. Gen'l for Cala.

M

No. 99960

J. W. AMES,

U. S. Surveyor-General for California

Date, Nov. 5th, 1877

SUBJECT:

Transmitting tracing for account, also acct. of Jas. E. Freeman for surveying Isla de la Gegua or Mare Island, amounting to $404.94 payable from appropriation for the survey of Private Land Claims, during the fiscal year ending June 30, 1876.

Ans. Nov. 16, 1877.

Referred to Division E

Received (G. L. O.) Nov. 14, 1877.

Theo. Wagner
U. S. Surveyor General

J. A. Robinson,
Chief Clerk

U. S. SURVEYOR GENERAL'S OFFICE
California
No. 610 Commercial Street,
Post Office Box No. 2260

San Francisco, Aug. 7th, 1879

Hon. J. A. Williamson,
Commn. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of 25th ult., directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and Wm. H. Aspinwall for Mare Island I have the honor to state that although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd day of March, 1857, no such decree can be found.

I inclose herewith a copy of the plat of survey and field notes of Freeman's survey made in July, 1877, Copy of Instructions to Freeman to survey said island, Copy of the Certificate of Advertisement, Copy of the Decree of Confirmation by the U. S. Board of Land Commissioners; Copy of a certificate from the Clerk of the U. S. District Court with extracts from the minutes in the case; and a Protest filed in this office July 14, 1879, by Bernard T. Hanley, Esq., of Washington City as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138.

Very respectfully,
Your obdt. serv't,
THEO. WAGNER,
U. S. Sur. Gen'l.

No. 38,856

THEO. WAGNER
U. S. Surveyor-General for California
Date Aug. 7, 1879

SUBJECT:

Transmitting Copy of Plat of Survey and Freeman's field notes of Survey of "Mare Island"—

Also Certificate of Advertisement, etc., and states reasons for disapproving survey.

See letter from the Secretary of the Navy dated Aug't 4, 1879. Filed. See to Secy. Int. Sept. 22, 1905 relative to making further survey under direction of G. L. O.

See 1343798.

Referred to Division E.

Received (G. L. O.) Aug. 18, 1879.

8 papers

No. 307

George W. Bissell, et al.

vs.

The United States.

In this case after hearing the proofs and allegations it is adjudger of commission that the claims of the said petitioners here in is valid and it is therefore decreed that their application for a confirmation there of be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and being an Island is bounded by the waters edge.

R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

[Endorsed]: No. 307. G. W. Bissell et al. Isla de la Yegua. Decree of Confirmation. Filed in office May 8, 1852, Geo. Fisher, Secy. Recorded in Record of Decisions Vol. 2, page 647, Geo. Fisher, Secy.

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. WAGNER, Surveyor-General of the United States for the State of California, DO HEREBY CERTIFY, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in

this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

311

The United States,

vs.

G. W. P. Bissell & W. H. Aspinwall.

"Ysla de Yegua, or Mare Island"

October 13, 1855—Filed Transcript from U. S. Land Com., in case No. 307.

Feby. 1, 1856—Filed Notice of Appeal from Atty. Genl.

March 2, 1857—Filed Decree of Confirmation.

April 1, 1857—Filed Order granting Appeal.

I, Southard Hoffman, clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Register entries in the case of the United States v. G. W. P. Bissell & W. H. Aspinwall No. 311 in said court, and I further certify that on the Minutes of said Court for the 2nd day of March, 1857, an entry appears enumerating

a number of cases among which is the case of the United States vs. Bissell & Aspinwall to which the following minute is appended "Decree of confirmation was entered in each of these cases by consent of the United States Dist. Attorney." And after due and diligent search I have been unable to find any Decree of Confirmation on file or of record in said case.

Attest my hand and seal of said District Court, this 4th day of August A. D. 1879.

SOUTHARD HOFFMAN,
Clerk U. S. Dist. Court of Dist. Cal.

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. WAGNER, Surveyor-General of the United States for the State of California, DO HEREBY CERTIFY, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

U. S. Surveyor-General's Office,
San Francisco, Cal.
July 19th, 1877.

James E. Freeman,
U. S. Deputy Surveyor.

Sir:—

Whereas, it appears by a certified copy of a decree placed on file in this office, that the claim of George W. Bissell and William H. Aspinwall to a tract of land named Isla de la Yegua, or Mare Island, has been finally confirmed by The Commission for ascertaining and settling the Private Land Claims in California, and by the U. S. District Court for the Northern District of Cal.

And Whereas, application has been made, by the interested parties, for a survey and location of said claim, I have thought proper to appoint you my Deputy in this special case, for the execution of the Survey thereof.

Agreeably to the decree in the matter, the claim herein referred to is confirmed in favor of the said claimants, to the following effect: "The place of which confirmation is hereby given is situate in the Bay of San Francisco, and is called Isla de la Yegua, or Mare Island, and being an Island is bounded by the water's edge."

Section 7 of the Act of Congress of July 1st, 1864, provides:

> "That it shall be the duty of the Surveyor-General of California, in making Surveys of the Private Land Claims finally confirmed, to

follow the Decree of Confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in a compact form. And if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as nearly as practicable, in a compact form."

You will therefore make your Survey in accordance with the requirements of the law, and said Decree of Confirmation.

You will therefore accurately ascertain and properly measure, run and mark the exterior boundaries of the claim, and restrict it to the confirmed quantity.

In all other respects you will comply with the printed instructions of this office, dated April 9th, 1864, a copy of which is herewith inclosed for your information and guidance.

[Seal] H. G. ROLLINS,
U. S. Surveyor-Gen'l, California.

Duplicate

U. S. Surveyor General's Office

San Francisco, Cal., Aug. 6, 1879.

A full, true and correct copy of the original as the same remains of record and on file "in duplicate" in this office.

Attest: THEO. WAGNER,

U. S. Sur. Gen'l

INSTRUCTIONS.

July 19th, 1877

RANCHO

Isla de la Yegua,

or Mare Island

Jas. E. Freeman,

Dep. Surveyor.

U. S. SURVEYOR GENERAL'S OFFICE

San Francisco, January 18, 1878.

I HEREBY CERTIFY, that by virtue of the provisions of the Act of Congress, approved 1st July, 1864, entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California," notice of the plat and survey having been made of the rancho Isla de la Yegua, or Mare Island, finally confirmed to George W. Bissell & Wm. H. Aspinwall, surveyed by Jas. E. Freeman, U. S. Deputy Surveyor, in July, 1877, has been advertised in accordance therewith in two newspapers, to-wit: the Vallejo Evening Chronicle published in the County of Solano, State of California, being near to where the said land is located; the

first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877; also in the Alta California a newspaper published in the City and County of San Francisco, State aforesaid; the first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877. And that the plat of said survey was retained in this office subject to inspection during all of ninety days, and until the expiration thereof from the date of the first publication.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my seal of office to be affixed in the City of San Francisco, this 18th day of January, 1878.

[Seal] I. W. AMES,
U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing is a full, true and correct copy of the original record of publication in the case of the survey of Mare Island as the same appears of record and on file in this office.

Attest: THEO. WAGNER,
U. S. Sur. Gen'l.

O. 38.856. E. 5
MARE ISLAND
Copy Record of
Advertisement.

FIELD NOTES
OF
The survey of "Isla de la Yegua" or
"Mare Island."
Situated in Sonoma County, State of California
Granted by Juan B. Alvarado to
Victor Castro May 20th, 1841.
Finally confirmed to
Geo. W. Bissell & William H. Aspinwall,
by the U. S. District Court, March 2d, 1857.
Surveyed by James E. Freeman.
Date of Contract June 28th, 1876.
Date of Instructions July 19th, 1877.
Survey commenced July 24th, 1877.
Survey completed August 1st, 1877.

PRELIMINARY OATH OF ASSISTANTS.

I,.....do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

.....

Subscribed and sworn to before me, this.....day of.....187...

.....
U. S. Deputy Surveyor

We, DANIEL SCULLY and N. W. BREW do solemnly swear that we will faithfully execute the

duties of Chain Carriers; that we will level the chain upon uneven ground, and plum the tally pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

his
DANIEL X SCULLY
mark
N. W. BREW,

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, Thomas Dixon do solemnly swear that I will well and truly perform the duties of Flagman according to instructions given me, and to the best of my skill and ability.

THOMAS DIXON

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLEY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, John Charlton, do solemnly swear that I will faithfully execute the duties of chain carrier or flagman according to the best of my skill and ability.

JOHN W. C. CHARLTON.

Sworn and subscribed to before me this 25th day of July, 1877.

CHAS. W. RILLEY,
Justice of the Peace in and for Vallejo,
Township—Solano Co., Cala.

In order to connect the survey of Mare Island with a section corner of the Public Land Survey's, I begin at the quarter sec. corner, bet. secs. 13 & 18, Ranges No. 3 & 4 West. Township No. 3 North, Mt. Diablo base & Meridian and run South 120 chains to the cor. of secs. 19, 24, 25 & 30.

Now commencing at the water edge on the Easterly side of Mare Island, West of the Sec. corner set a post 4 x 4 x 40 inches marked S. 24 & 25 bears West 25 links distant standing by a prominent flag pole of the U. S. Coast Survey.

July 24th, 1877.

Thence along the water's edge at ordinary high water mark.

Var. 16° 15' E.

1	S. 40° E.	23.90	The cor. of secs. 19, 24, 25 & 30 on main land brs. N. 46° E.
		31.40	
2	S. 27½° E.	12.70	S. E. cor. of Magazine brs. West 50 lks.
		15.00	

3	S. 40¼°	E.	3.50	
4	S. 36½°	W.	3.50	
5	S. 69°	W.	7.50	
6	S. 16°	E.	3.70	
7	S. 13¼°	W.	2.50	
8	S. 41°	W.	2.60	
9	S. 75°	W.	1.60	
10	S. 86½°	W.	5.00	
11	S. 30°	W.	4.20	
12	S. 85½°	W.	2.00	
13	S. 62°	W.	8.10	Light House 2 chs. North.
14	N. 54°	W.	40.00	
15	S. 80°	W.	2.30	
16	S. 86½°	W.	3.50	
17	N. 74½°	W.	3.60	
18	N. 66½°	W.	2.70	
19	N. 33°	W.	1.90	
20	N. 87°	W.	1.00	
21	N. 48½°	W.	1.84	
22	N. 47½°	W.	10.50	
23	N. 77°	W.	2.50	
24	S. 55°	W.	2.50	
25	N. 43½°	W.	1.00	
26	N. 31°	W.	29.00	
27	N. 60½°	W.	3.20	
28	S. 77°	W.	2.90	
29	N. 5°	W.	4.50	
30	N. 23½°	W.	4.30	
31	N. 31°	E.	1.20	
32	N. 33½°	W.	4.70	
33	N. 25°	W.	3.30	
34	N. 32½°	W.	10.00	
35	N. 25½°	W.	26.10	S. W. Cor. of Barracks brs. N. 44 E.
				July 25th, 1877.
36	N. 4½°	E.	2.00	
37	N. 24°	W.	5.50	
38	N. 30°	E.	3.30	
39	N. 31½°	E.	2.20	
40	N. 17°	E.	5.40	S. W. cor. of Barracks brs. S. 75° E.

41	N. 31°	W.	6.00	
42	N. 40°	W.	4.00	
43	N. 50½°	W.	3.30	
44	N. 83½°	W.	2.00	
45	N. 16°	W.	2.70	
46	N. 43°	W.	1.90	
47	N. 14°	W.	1.70	
48	N. 72½°	W.	1.40	
49	N. 18½°	W.	5.60	
50	N. 10°	W.	7.00	
51	N. 26½°	W.	7.00	
52	N. 19°	E.	4.20	
53	N. 22°	W.	6.00	To Tide Lands thence along Tide Lands.
			12.00	
54	N. 34°	W.	24.00	
55	N. 40°	W.	44.00	
56	N. 52°	W.	44.00	
57	N. 61°	W.	64.00	
58	N. 64°	W.	36.00	
59	N. 70°	W.	196.00	
60	N. 61°	W.	40.00	
61	N. 62°	W.	15.00	
62	N. 58¼°	W.	25.00	
63	N. 67°	W.	13.50	
64	N. 86¼°	W.	4.00	A fishermans cabin 1 ch. North.
				July 26th, 1877.
65	N. 50½°	W.	7.50	
66	N. 79½°	W.	18.00	
67	N. 55°	W.	5.00	
68	N. 81°	W.	23.00	
69	N. 67½°	W.	10.00	Leaves San Pablo Bay.
			"	To mouth of Sonoma Creek comes from N. W.
70	N. 63¼°	W.	40.00	
71	N. 23¼°	W.	8.00	Point of Land at the confluence of the Huichica Slough & Sonoma Creek brs. N. 50° W. about 10 chs. dist. Thence along Huichica Slough.

72	N. 26¾°	E.	4.50	
73	N. 63½°	E.	11.50	
74	N. 87½°	E.	23.00	
75	N. 87°	E.	41.00	
76	East		11.50	
77	S. 74½°	E.	40.00	
78	S. 85½°	E.	10.70	
79	N. 75¼°	E.	9.50	
80	N. 60½°	E.	18.00	To a point opposite the junction of South or "Navy Yard" Slough with "Middle Napa" Slough, thence up South or Navy Yard Slough.
81	S. 36°	E.	2.30	
82	S. 1½°	W.	7.00	
83	S. 5°	W.	11.70	
84	S. 6½°	E.	7.50	
85	S. 37°	E.	7.00	July 27th, 1877.
86	S. 75½°	E.	4.00	
87	East		6.70	To the Westerly Mouth of Montgomery Slough crs. S. E. 2 chs. wide.
88	N. 41°	E.	4.00	
89	N. 35½°	E.	12.00	
90	N. 22°	E.	12.50	
91	N. 3½°	E.	26.00	
92	N. 10°	W.	22.00	
93	N. 56½°	E.	5.00	
94	S. 65½°	E.	20.00	
95	S. 78°	E.	4.00	
96	N. 87½°	E.	11.00	
97	S. 61°	E.	1.50	
98	S. 52°	E.	4.40	
99	S. 3½°	E.	5.50	
100	S. 15°	W.	10.40	
101	S. 6¼°	W.	8.00	
102	S. 8°	E.	11.00	
103	S. 30°	E.	8.50	To Easterly Mouth of Montgomery cut off or slough crs. S. W.
			9.98	Over same.

104	S. 74½°	E.	20.00	
105	East		21.00	
106	N. 56¼°	E.	12.50	
107	N. 23¼°	E.	8.00	
108	N. 11½°	E.	8.50	
109	N. 63½°	E.	9.00	
110	N. 60½°	E.	6.58	
111	S. 63¾°	E.	13.76	
112	N. 64½°	E.	12.60	
113	N. 82°	E.	3.18	July 28th, 1877.
114	S. 23¾°	E.	2.18	
115	S. 25½°	W.	4.47	
116	S. 61¾°	W.	8.94	
117	S. 35½°	W.	28.13	
118	S. 10¾°	W.	9.60	
119	S. 33°	E.	23.20	
120	S. 15°	E.	16.14	
121	S. 51½°	E.	14.56	
122	S. 77¾°	E.	10.53	
123	N. 75¼°	E.	17.90	
124	N. 43½°	E.	39.50	
125	N. 60½°	E.	11.92	
126	S. 73°	E.	4.97	
127	S. 9°	E.	23.55	Boat cut off or Dutchmans slough 1 ch. wide.
128	S. 46¾°	E.	23.76	
129	S. 65½°	E.	34.00	
130	N. 89°	E.	56.56	Leave Navy Yard or South Slough and enter creek.
131	S. 78½°	E.	17.10	
132	S. 9½°	W.	60.00	
133	S. 4½°	E.	42.70	To South Easterly mouth of Boat Cut off or Dutchmans slough 6 chs. wide co. N. W.
134	S. 13¾°	W.	13.91	
135	S. 16½°	E.	40.50	
136	S. 31½°	E.	23.11	
137	S. 42½°	E.	24.60	
138	East		23.21	To the Northerly cor. of Machine Shop.
				" Leave Tide Lands.
				July 29th, 1877.

139	S. 40½°	E.	28.50	
140	S. 24½°	E.	8.63	To Ferry Boat Wharf co. N. E. & S. W.
			14.00	To Dry Dock.
			33.15	
141	S. 42°	E.	37.42	
142	S. 38°	E.	33.46	
143	S. 19°	E.	6.45	To the place of beginning.

Containing 5227-22/100 acres

GENERAL DESCRIPTION

With the exception of a narrow strip of land on the Easterly side of the Island, all that portion where the Navy Yard is situated extending Southerly from the Machine shop, is high dry ground rising gradually towards the South.

At the Southerly end of the Island the bluffs appear to be about 200 ft. in height—soil generally first rate.

That portion extending North Westerly from the Machine shop, is tide or swamp land producing tule & other salt marsh grasses.

The "Boat Cut off" known also as "Dutchmans slough" is about 60 lks. wide near its Westerly end —widening out towards the South Easterly end to 8 or 10 chains.

The South or Navy Yard slough varies in width from 6 to 10 chains.

The Northern boundary is entered by numerous small sloughs, which ramify this portion of the Island in every direction. Owing to the action of the tides all the sloughs are very broad at their entrance but narrow rapidly as they extend inland. Sailing vessels of Light Draught can pass around

are Island by way of South or Navy Yard slough. Several Iron Monuments are erected near the ater's edge along the Northern boundary with no-es thereon forbidding persons to trespass on the nds, as they are claimed by the U. S. Government. August 1st, 1877.

JAS. E. FREEMAN

WE DO HEREBY CERTIFY, that we assisted as. E. Freeman, U. S. Deputy Surveyor, in survey-g the boundary lines of the Rancho Isela de la egua or Mare Island situated in the County of noma in the State of California, and finally con-med to Geo. W. Bissell & William H. Aspinwall, d that said Rancho has been in all respects, to e best of our knowledge and belief, well and faith-lly surveyed, and the boundary monuments estab-hed according to the laws of the United States, d the instructions of the Surveyor-General.

.....Compassman,

N. W. BREW Chainman,

JOHN W. C. CHARLTON Chainman,

His

DANIEL X SCULLY Axeman,

mark

THOMAS DIXON Flagman.

Subscribed and sworn to before me this 1st day August, 1877.

CHAS. W. RILLEY,

Justice of Peace

Vallejo—Solano Co., Cala.

I, Jas. E. Freeman, U. S. Deputy Surveyor, do solemnly swear that, in pursuance of instructions from H. G. Rollins, U. S. Surveyor-General for the State of California, bearing date the 19 day of July, 1877, and in strict conformity to the laws of the United States and the said instructions from the Surveyor-General, I have well and faithfully surveyed the boundary lines of the Rancho Isla de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall and I do further solemnly swear that the foregoing are the true and original field notes of said survey.

JAMES E. FREEMAN,
U. S. Deputy Surveyor.

Subscribed by said Jas. E. Freeman, U. S. Deputy Surveyor, and sworn to before me, a U. S. Commr. in and for the County of San Francisco in the State of California, this 29th day of Aug., 1877.

J. A. ROBINSON,
U. S. Commissioner.

U. S. Surveyor General's Office,
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing transcript has been correctly copied from the original field notes as the same remain of record and on file in this office.

Witness my hand and official seal the day and year in this certificate written.

THEO. WAGNER
U. S. Sur. Gen'l.

General Land Office

October 12, 1852.

Samuel D. King, Esq.,
Surveyor General of California,
San Francisco, Cal.

Sir:

Your letter of 19th August last has been received. You state that "While in many cases the margins of the tide waters of this State consist of Bluff banks, yet in some portions of the State, especially about the Bay of San Francisco and the mouths of its tributary streams, there is frequently a wide strip of low ground between the main land and the Bay, etc., subject in whole or in part to overflow and frequently greatly cut up by narrow, but sometimes deep bayous or Channels; and local circumstances will, in some instances, render such low grounds valuable. In surveying the public lands and private claims, it therefore, becomes important that the principles which are to govern the action of this Office, so far as such lands are concerned should be settled by the Department," and you therefore request "instructions as to the proper position of the meander lines in such cases," by my stating "whether they shall be run to correspond with the limits of ordinary high tides, or go to the usual low water line."

In reply to the foregoing inquiry you are informed that the public surveys, under the circum-

stances set forth, are to be so ordered that their lines shall include, at least, the ordinary low water mark—the surveys so situated purport to have a water boundary and one to which peculiar value may be attached, and therefore the meanders are to be so ordered that no pretext shall hereafter exist for claims to any land on the water line, in front of the surveyed lines.

The principles laid down in these instructions were overruled in the case of U. S. v. Pacheco by the Supreme Court 2 Wallace p. 587.

You further enquire as follows—"Also where a claim under either of the former governments calls for the Bay, or other tide water, as one of its boundaries, is the land occasionally, or periodically covered by water, and beyond the line which is to be considered as the front line of the tract, liable to be surveyed and appropriated as public land, or must it be considered as appurtenant to the claim to the main land and therefore exempt from all action upon the part of this Office"?

In the survey of private claims whose calls are as aforesaid, the same principles must be made to govern as in the case of public surveys—the lands which are "periodically or occasionally covered by water", are to be considered and treated as within the limits of such claims and not "beyond the line which is to be considered as the front line of the tract," and to this end the front of the tract must be meandered, as in the case of the public land

under the former enquiry, so as to include the lands "periodically or occasionally covered by water"; otherwise the question of right to strips of land found "beyond the line which is to be considered as the front line of the tract," and which may hereafter become of a highly appreciated value, may not be regarded as having been finally disposed of under the surveying instructions, but claimed to be treated as an open question, subject to judicial determination which may be attended with troublesome consequences in the future, and hence the proper procedure is so to meander as to prevent any doubt hereafter.

I am very respectfully,
Sir, Your Ob't Serv't,
JOHN WILSON,
Commissioner.

P. S. Where the progress of the lines of the public surveys is interrupted by Swamps, the surveyed line will be made to terminate at the Swamp and the outlines of the Swamp will be meandered and exhibited on the plats of Survey.

J. WILSON.

See letter July 15, 1859 interdicting the meandering.

General Land Office
February 16, 1853.

Samuel D. King, Esq.,
Surveyor-General,
San Francisco, California.

Sir:

Herewith are transmitted copies of two communications, one from the Honble Secretary of the Navy dated 9th inst. in reference to the proposed reservation under the provisions of "The 3rd Section of the Act of last Session, Chap. CIX, Statutes at large, making appropriations for the Naval Service", whereby the Secretary of the Navy is authorized and directed to select a site for a Navy Yard and "Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of public lands,"—in pursuance whereof the Secretary of the Navy recommends that the President "give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land

J. M. M. See letter to the Secretary of the Navy Feby. 16th, 1853. Receipt of this instruction ackd. by L. Ransom, Esq., Actg.-S. Gen'l of Cal. in his letter of Mar. 31st, 1853. Advised the Secy. of the Navy of the fact 30th Apl. '53.

MARE ISLAND Reservation for Naval purposes.

ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses,"— Whereupon the President has directed as follows:

"Washington, Febr'y 11, 1853.

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate department that the reservation may be properly and legally recorded."

(Signed) "Millard Fillmore".

The other communication, herewith transmitted, is a copy of a letter from the Hon. Secretary of the Navy to the Hon. Secretary of the Interior, dated 12th ins't, both of which have been referred by the latter to this office, for the necessary action to be taken thereon.

The island alluded to will be found enumerated amongst the reservations for public uses made by the President and communicated in the letter from this Office to you on the 24th June 1851.

You will please to record these orders of reservation and advise this Office of your having so done. They are recorded in this Office in the California letter book under the date hereof.

The sheet of Ringgold's Charts showing the position of the Island alluded to, which was transmitted to this Office with the Communication referred to, is herewith transmitted. I hope shortly to be en-

abled to furnish you with a number of sets of the charts published by that officer.

Very respectfully
Your Ob't Serv't
JOHN WILSON,
Commissioner.

Navy Department
February 9th, 1853.

Sir:

By the 3rd Section of the Act of last Session, Chapter CIX. Statutes at large, making appropriations for the Naval Service, the Secretary of the Navy is "authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California, or neighboring waters either by purchase or reservation of public lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be

found to exist in the United States, or not, it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress above referred to, authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a Map or Chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco, and the waters connected therewith.

I have the honor to be

With the highest respect

Your Ob't Serv't

JOHN P. KENNEDY.

To the President.)

Washington, February 11, 1853.

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservation may be properly and legally recorded.

MILLARD FILLMORE.

Navy Department

February 12th, 1853.

Sir:

I have the honor to enclose herewith a letter addressed to the President from this Department under date of the 9th inst. asking him to give the necessary orders and to direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors waters and anchorages connected therewith and necessary to the use of the same, be reserved for Public uses. And the President having made the reservation and instructed me to "communicate that fact to the Appropriate Department, that the

See Commr. letter to Secy. of Navy, Feby. 11, 1853 and instructions to Sur. Gen. of California, ante, same date.

See Commr. letter to Sec. of the Navy. Apl. 30th, 1853.

reservation may be properly & legally recorded," as will appear by his order of the 11th instant added by him to the letter from this Department herein before mentioned. I respectfully request that the necessary order and notice may be given to effect the reservation of the said tract of land, known as Mare Island, in the Bay of San Francisco, in California, and that this Department may be advised when the necessary forms shall be completed.

I have the honor to be
Very respectfully,
Your Ob't Serv't
JOHN P. KENNEDY.

Hon. A. H. H. STEWART,
Secretary of the Interior.

General Land Office
February 16, 1853.

Hon. John Kennedy
Secretary of the Navy.

Sir:

Your letter to the Ho. the Secretary of the Interior, dated 12 inst. communicating the order of the President of the States for the reservation, for Naval purposes of "the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinas and Napa

See letter to Secy. of the Navy, Apr. 30,

1853 stating that the order had been recorded in the Sur. Gen'l. Office at San Francisco, as per advices dated 31 Mar. '53 and 29th Apl. 1853.

I. M. M.

Creek known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island; and the harbors, waters and anchorages connected therewith and necessary to the use of the same," has been referred to this Office for the purpose of having the necessary action taken thereon.

The order of the President has been duly recorded in this Office, and a copy thereof, together with a copy of your letter to the Secretary of the Interior, has been addressed to the Surveyor General of California (and which will be mailed for the Steamer which is expected to sail on the 20 inst.) with instructions to him, to have the same also recorded in his Office.

In this connection I would also beg leave to recur to the fact that there is enumerated amongst many other reservations, for public uses, of lands in California ordered to be reserved and exempted from sale by the President formerly, the island ("Mare") alluded to, and that such order was communicated to the Surveyor General of California by letter dated 24th Jan. 1851.

I have the honor to be

With great respect

Your Ob't Serv't

JOHN WILSON,

Commissioner.

General Land Office

April 30, 1853.

Hon. I. W. C. Dobbin,

Secretary of the Navy.

Sir:

In my letter to your Department dated the 16 February last, it was stated that the order of the President for the reservation of "MARE" island in the Bay of San Francisco (therein described) for Naval purposes, had been recorded in this Office, as desired by the Department, and been transmitted to the Surveyor General of California to be also recorded in *his* office at San Francisco.

I. M. M.

A communication has just been received from the "Acting Surveyor General" of California, acknowledging the receipt of the aforesaid instructions, and stating that the order for the reservation of said Island for the purpose desired, had been duly recorded in his Office.

I have the honor to be with great respect

Your Ob't Serv't

JOHN WILSON,

Commissioner.

Department of the Interior
General Land Office

J. W. D.

Washington, D. C., Nov. 16, 1877.

J. W. Ames, Esq.,
U. S. Surveyor General,
San Francisco, Cala.

Sir:

The surveying account of Jas. E. Freeman, amounting to the sum of $404. 94/100 received with your letter of the 5" inst. is transmitted to the Treasury for payment on this day with request that draft be sent to payee in care of your office.

Yours respectfully,
J. A. WILLIAMSON,
Commissioner.

Department of the Interior
General Land Office

J. E.

Washington, D. C., July 25, 1879.

Theo. Wagner, Esq.,
Surveyor General,
San Francisco, Cala.

Sir:

You are requested, immediately upon the receipt hereof, to forward to this Office a copy of the final confirmation of Mare Island to G. W. P. Bissell and Wm. P. Aspinwall, by the District Court, said confirmation bearing date March

Mare Island
291

2, 1857. Also description of limits. Has the Island been surveyed?

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

Department of the Interior
General Land Office

N. F.

Washington, D. C., Aug. 7, 1879.

Theodore Wagner, Esq.,
U. S. Surveyor General,
San Francisco, California.

Sir:

Referring to letter from this Office dated the 25th ultimo, requesting information upon the subject of Mare Island in California, I have also to request that if there is in your office a plat and notes of the survey of said Island, made or approved by government officers, you will cause to be prepared and forwarded to this Office a copy of such survey.

285
Mare Island

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

Mr. PECKHAM, continuing: We next offer letter of the Commissioner of the General Land Office, W. A. Richards, dated September 22, 1905, letter from Acting Secretary Ryan to the Secretary of the Navy.

The COURT: The same objection, Mr. Kelby.

Mr. KELBY: The same objection, to which is to be added the further objection that all this has been overruled and abandoned by the Interior Department and the Land Office.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit Z-1".)

PLAINTIFF'S EXHIBIT Z-1.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

April 15, 1932.

I hereby certify that the annexed copies of letters, filed under 2996-1905 L & R R, are true and literal exemplifications of the originals and records on file in this office in my custody.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this

office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.

2996-1905
L. & R. R. Div. 9/28/05

The Secretary of the Navy.

Sir:

In a letter of the 9th instant to the Department the Acting Secretary of the Navy stated that, in connection with the suit instituted by E. H. Sawyer questioning the ownership by the Government of certain lands heretofore regarded as lying within the limits of the United States Navy Yard, Mare Island, California, it is desired to ascertain definitely the position of certain section lines which ought to be extended to determine the limits of the property in controversy.

With this end in view he requested that, if such action can be appropriately taken, instructions be issued directing the early survey of the lands.

The letter, with its enclosures, was referred to the Commissioner of the General Land Office with instructions to take action as requested and report in the premises to the Department.

In answer to the letter I have the honor to enclose a copy of the report thereon by the Commissioner under date of the 22nd instant.

The report sets forth the facts shown by the records of the General Land Office relating to the acquisition of Mare Island by the United States by purchase of the entire area thereof, based on the

survey executed by the Board of Officers of the United States, sent to California presumably by the Navy Department.

In view of the facts covered by the report, the Commissioner has expressed the opinion that his office has no authority to survey any land in the locality described, as it is not public land of the United States.

I concur in the report of the Commissioner and return herewith the enclosures in the letter of the Acting Secretary of the Navy.

Very respectfully,

.....,

Acting Secretary.

1905-114650

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C., September 22, 1905.
Address Only the
Commissioner of the General Land Office.

Subject:—Relative to instructing the U. S. Surveyor General to survey lands within the limits of the Mare Island Navy Yard, California.

The Honorable,
The Secretary of the Interior.

Sir:—

I am in receipt, by your reference of September 13, 1905, of a letter dated September 9, 1905, from the Acting Secretary of the Navy, addressed to you,

inclosing a letter dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., addressed to the Commandant, Navy Yard, Mare Island, California, recommending that the Secretary of the Interior authorize the U. S. Surveyor General of California to survey certain section lines in Township 3 North, R. 4 W., M. D. M., California, within the limits of the Mare Island Navy Yard, embracing "Tide Land Survey No. 34", and inclosing two blue prints showing in red the approximate location of the land included in said Tide Land Survey No. 34, and a letter from the U. S. Surveyor General of California, dated August 12, 1905, in reply to his communication of August 10, 1905, in which the Surveyor General states that only a small portion "of the public land lines in T. 3 N., R. 4 N., M. D. M., required for your purpose" have been surveyed by the Government, and that:

> "The section lines referred to in Tide Land Survey No. 34, Solano County, are projections from the lines and corners described in the above mentioned field notes, surveyed, if ever by the surveyor making said Tide Land Survey."

In the letter from Mr. Rousseau, above described, reference is made to a suit instituted by E. H. Sawyer in the case of Sawyer vs. McCalla, which is expected to come to trial in November, and which he states is being brought against the United States by Sawyer, "who questions the Government ownership to Tide Land Survey No. 34, Solano County, and

accretions" lying to the North of the Steam Engineering Buildings, and comprising about 375 acres, which the U. S. Attorney desires to have definitely established; that said Tide Land Survey No. 34 is located and bounded with reference to certain section lines which it becomes necessary to definitely and accurately establish, and it is of considerable importance to the U. S. Attorney, in his defence of said suit,

> "that the section lines referred to in Tide Land Survey No. 34, Solano County, should be projected as soon as possible",

and referring to said blue prints, he calls attention to three corners of the SE¼ of Sec. 10, T. 3 N., R. 4 W., M. D. M., which, he states, "it is desirable to have located in the usual manner prescribed by law, by the Department of the Interior".

The Acting Secretary of the Navy, in his said letter dated September 9, 1905, addressed to you, requests that if such action can be appropriately taken, instructions be issued to the Surveyor General directing the survey of the lands, at the earliest date practicable.

In your note of reference, you direct this office to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department in the matter.

I have, therefore, the honor to report that the official plats of Ts. 3 and 4 N., R. 4 W., M. D. M., California, show that Mare Island is unsurveyed, and the records show that said island was claimed

before the California Land Commission, established by Act of Congress approved March 3, 1851, (9 Stat., 631), by George W. P. Bissell and Wm. H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, he having received a grant to the land by Juan B. Alvarado, May 20, 1841, and it was confirmed to them, (Bissell and Aspinwall), by the Commission, May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

> "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called 'Isla de la Yegua', or Mare Island, and, being an island, is bounded by the water's edge".

The affirmatory decree of the United States District Court is not in this office, and under date of August 7, 1879, the U. S. Surveyor General, in his letter to this office in reply to letter from this office to him, dated July 25, 1879, stated that:

> "Although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd. day of March, 1857, no such decree can be found".

The Surveyor General at that time also transmitted a plat and field notes of the survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864, (13 Stat., 332), showing the

area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of Confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his, (the U. S. Surveyor's General's), office, July 14, 1879, by Bernard F. Hanley, of Washington, D. C., "as attorneys for owners".

With reference to the survey as executed by James E. Freeman in 1877, the Surveyor General in his letter dated August 7, 1879, states as follows:

> "I consider the survey incorrect in that, it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained South of a line run across the island from the vicinity of Station No. 54 to Station No. 138".

Copies of said letter, dated August 7, 1879, from the U. S. Surveyor General and its enclosures, above referred to, were forwarded with letter "E" from this office, addressed to you, dated August 3, 1900, in reply to a letter from the Secretary of the Navy dated July 23, 1900, addressed to you.

The records in this office further show that prior to confirmation of the island to Bissell and Aspinwall, the President by his order, dated November 6, 1850, reserved said island for public purposes, and on February 9, 1853, the Secretary of the Navy

addressed a letter to the President, recommending the reservation as a site for a navy yard and naval depot, of Mare Island, describing the land to be reserved, as follows:

> "The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island and harbors, waters and anchorages connected therewith, and necessary to the use of the same".

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

> "The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservations may be legally recorded".

In addition to the foregoing, it is shown that, in reply to a letter from this office dated July 26, 1879, the Secretary of the Navy, under date of August 4, 1879, transmitted a copy of deed dated January 4, 1853, from George W. P. Bissell, Wm. H. Aspinwall, and Mary S. McArthur, to the United States, for the island, in consideration of the sum of $83,491, "to them paid in proportion to their said interests, respectively", and the land is described in copy of deed as follows:

> "All that tract of land and island known as Mare Island, in the Bay of San Pablo, as re-

cently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and marsh belonging to the same, or which has ever been reported or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging, (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof".

Attached to this copy of said deed is also a copy of the opinion of the Solicitor of the Navy Department, dated October 20, 1873, addressed to "Commo. C. R. P. Rogers, Chief of Bureau &c", in which it is stated as follows:—

"During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.

The decision of the Board of Commissioners of the U. S., under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now hold.

"If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay".

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter; "See letter from the Secretary of the Navy, dated August 4, 1879", and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell, Aspinwall and McArthur, which survey was deemed sufficient for the purpose of conveying the land.

In view of the foregoing, I am of the opinion that this office has no authority to survey any land in the locality described, for the reason that it is not public land of the United States, the same having been purchased by the United States from the private land claimants aforesaid who derived their title from the Government of Mexico, as stated, and there is no appropriation available out of which the expense of surveying other than public lands of the United States and reservations or abandoned reservations, under the jurisdiction of this office, could be paid.

If any further survey of the land is desired, I respectfully submit that it should be executed under the direction of the Navy Department under whose jurisdiction the land now appears to be.

The papers transmitted by you are returned herewith.

Very respectfully,
W. A. RICHARDS
Commissioner.

WHW.

DEPARTMENT OF THE INTERIOR
Received Sep. 25, 1905
L.&R.R.DIV.

General Land Office
September 22, 1905.
Commissioner

Acknowledges receipt by Department reference of Sept. 13, 1905 of a letter dated August 19, 1905 from H. H. Rosseau, Civil Engineer U. S. N. transmitted with letter dated Sept. 9, 1905 from the Acting Secretary of the Navy requesting that certain surveys within the limits of Mare Island Navy Yard Cala. be made under the direction of this office. Reports in matter, in duplicate, and returns papers as directed.

Letter to Secy. of the Navy
Sept. 28/05

In Reply Address the Secretary of the Navy
and Refer to No. 445-5

NAVY DEPARTMENT,
Washington, September 9, 1905.

Sir:

This Department is in receipt of reports from the navy yard, Mare Island, stating that in connec-

tion with the suit instituted by E. H. Sawyer questioning the Government's ownership of certain lands heretofore regarded as lying within the limits of the yard named, it is desired definitely to ascertain the position of certain section lines which ought to be extended in order to determine the limits of the property in controversy.

From a letter addressed by the Surveyor General for California to the Civil Engineer at the navy yard, Mare Island, under date of August 12, 1905, copy herewith enclosed marked A, it appears that the "public lines referred to" (T. 3 N. R. 4 W.—M. D. M.) have never been surveyed by the Government. See also in this connection two blue prints showing tide land survey No. 34, likewise transmitted (marked, respectively, B and C).

Further information respecting the necessity for the survey of these lands is set forth in a letter, dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., (original marked D).

It is requested that if such action can appropriately be taken, instructions be issued to the Surveyor General of the State of California directing the survey of the lands referred to at the earliest date practicable.

I have the honor to be, Sir,

Very respectfully,

THOS. H. DARLING

Acting Secretary.

The Secretary of the Interior.

Navy Secy. Acting

Sept. 9, 1905.

Refers to suit instituted by E. H. Sawyer, and asks that Surveyor General of California be directed to survey at earliest practicable date described lands heretofore regarded as being within the limits of Mare Island Navy Yard, California.

(4 enclosures)

Department of the Interior

September 13, 1905.

Respectfully referred to the Commissioner of the General Land Office with instructions to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department of the action taken.

THOS. RYAN,

Act. Secretary.

U. S. General Land Office, Received Sep. 15, 1905.

September 28, 1905.

The Secretary of the Navy.

Sir:

In a letter of the 9th instant to the Department the Acting Secretary of the Navy stated that, in connection with the suit instituted by E. H. Sawyer questioning the ownership by the Government of certain lands heretofore regarded as lying within the limits of the United States Navy Yard, Mare

Island, California, it is desired to ascertain definitely the position of certain section lines which ought to be extended to determine the limits of the property in controversy.

With this end in view he requested that, if such action can be appropriately taken, instructions be issued directing the early survey of the lands.

The letter, with its enclosures, was referred to the Commissioner of the General Land Office with instructions to take action as requested and report in the premises to the Department.

In answer to the letter I have the honor to enclose a copy of the report thereon by the Commissioner under date of the 22nd instant.

The report sets forth the facts shown by the records of the General Land Office relating to the acquisition of Mare Island by the United States by purchase of the entire area thereof, based on the survey executed by the Board of Officers of the United States, sent to California presumably by the Navy Department.

In view of the facts covered by the report, the Commissioner has expressed the opinion that his office has no authority to survey any land in the locality described, as it is not public land of the United States.

I concur in the report of the Commissioner and return herewith the enclosures in the letter of the Acting Secretary of the Navy.

Very respectfully,

THOS. RYAN,
Acting Secretary.

Mr. PECKHAM, continuing: We next offer in evidence from Page 390 of the Report of Surveyor General of California, found on Page 377 of Executive Documents, Third Session, 45th Congress, 1878-79, Volume 9, the report of the Secretary of the Interior, No. 1.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

Mr. PECKHAM, continuing: And also the report from Executive Documents of the Third Session, 46th Congress, 1880-81, Volume 9, [252] the report of the United States Surveyor General's Office, of August 10, 1880, commencing at Page 689 of that book, the portion of the report contained in "H", statement of descriptive notes, decrees of Court, etc., continued, Page 751.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit AA".)

PLAINTIFF'S EXHIBIT AA.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

COPIED FROM REPORT OF U. S. SURVEYOR GENERAL OF CALIFORNIA, DATED AUGUST 22, 1878, PRINTED AS PART OF EXECUTIVE DOCUMENTS, 3rd SESSION, 45th CONGRESS, 1878-79, Vol. 9, pages 377, 390.

"United States Surveyor General's Office.
San Francisco, Cal., August 22, 1878.

P. 377 Sir: In compliance with your instructions I have the honor to submit, in duplicate, the annual report of this office in relation to the surveying service in California during the fiscal year ending June 30, 1878.

I also forward tabular statements as follows:

* * * * * * *

On the 13th of September, 1877, Henry G. Rollins resigned the office of United States surveyor general for California, and was succeeded on

P. 390 the 17th of October of the same year by General John W. Ames. On the 6th of April, 1878, after several months of painful illness, General Ames departed this life, respected and beloved by all with whom he had come in contact during his brief administration.

The duties of the office were assumed by the present incumbent on the 25th of June, 1878.

Edward D. Knight, an employe of this office for many years, died March 6, 1878, after a prolonged illness.

Very respectfully, your obedient servant,

THEO. WAGNER,
United States Surveyor General
for California.

Hon J. A. WILLIAMSON,
Commissioner of the General Land Office."

COPIED FROM REPORT OF U. S. SURVEYOR GENERAL OF CALIFORNIA, DATED AUGUST 10, 1880, PRINTED AS PART OF EXECUTIVE DOCUMENT, 3rd SESSION, 46th CONGRESS, 1880-81, Vol. 9, pages 689, 755, 751.

"United States Surveyor General's Office,
San Francisco, Cal., August 10, 1880.

Sir:

P. 689 I have the honor to submit in duplicate the annual report of this office in relation to the surveying service in this district during the fiscal year ending June 30, 1880.

I also submit in duplicate tabular statements, as follows:

* * * * * * *

P. 751 H.—Statement of descriptive notes, decrees of court, &c.—Continued.

When sent.	Papers Transmitted.	Name of claim.	To Whom confirmed.
Aug. 7, 1879	Copy plat of survey; copy Freeman's field notes; copy instructions to Freeman to make survey; copy certificate of advertisement; copy decree of confirmation by United States board of land commissioners; copy of certificate of clerk of United States district court as to decree of confirmation by said court, with extracts from the minutes in the case; protest filed July 14, 1879, by B. T. Hanley, esq., of Washington City, as attorney for owners.	Mare Island	G. W. P. Bissell and William H. Aspinwall.

* * * * * * *

THEO. WAGNER,
United States Surveyor General
for California."

Mr. PECKHAM, continuing: We offer from Tubbs vs. Willhoit, 138 U. S., 143, a letter of the Secretary of the Interior, Mr. Schurz, appearing on Page 143 of 138 U. S. reports.

Mr. KELBY: The same objection.

The COURT: The same ruling and exception.

Mr. PECKHAM, continuing: We offer in evidence the letter of Edwin H. Sawyer, dated April 7, 1917, the inventory of his estate and the Decree of Distribution of his estate, certified by the Clerk of Alameda County.

Mr. KELBY: Objected to as immaterial, irrelevant and incompetent and an attempt on the part

of the plaintiff here to rely upon any weakness in the title of the defendants rather than on the strength of its own patent.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit BB".)

TESTIMONY OF F. A. STEIGER

A witness for Plaintiff.

I am the County Surveyor of Solano County and have in my custody the records of previous surveys, maps, etc., of that County. I have been subpoenaed to bring with me the original survey of Solano County, made by Surveyor Patton, but I find there is no map in our office that I have ever seen that purports to be the original survey of the County. I don't know the date of the oldest map showing the [253] boundaries of the County, but sometime in the 70's there is a map in the office that purports to be that, but not in the records of our office. I have searched for the Patton map but cannot find it. I have been subpoenaed to and herewith produce from the records in my office a book called a record of surveys of school land warrants. The school warrant found on Pages 36, 37, 38 and 39 of this record are signed by J. R. Loring, County Surveyor, by William Denton, Deputy for Solano County.

(The document was offered in evidence, subject to the same objection, overruled and exception, and was received in evidence as "Plaintiff's Exhibit CC".)

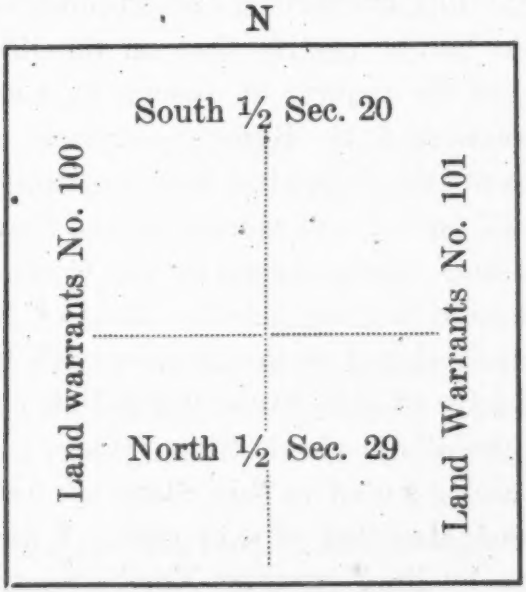
PLAINTIFF'S EXHIBIT CC.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

Post from thence North 80 chains to the place of beginning all of which is in Township 5 North Range 1 West. The boundaries of which are more particularly set forth by the annexed Plat of said survey.

Township 5 North Range 1 West



Variation N 16° 00 E.

Nov. 17 1852

F. R. Loring, Co. Surveyor
by Wm. Denton, Deputy for
Solano County.

State of California,
County of Solano.

This instrument of writing was filed by me for record the 17th day of November, A. D. 1852 at 10 O'clock A. M.

Saishel Bynum
County Clerk.

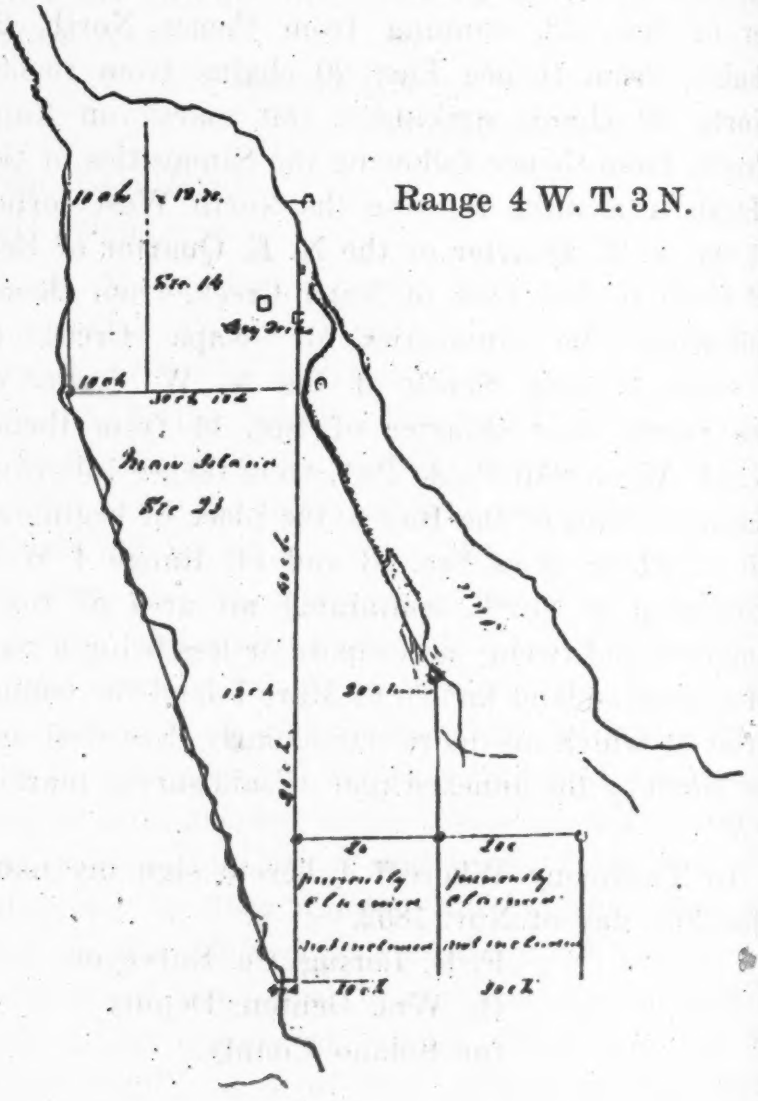
State of California,
Mare Island.—ss.

I, F. R. Lorring, County Surveyor of Solano County and duly authorized and empowered for the purpose do hereby certify that on the 19th day of Nov. 1852 at the request of Joseph P. Vaughn and J. B. Harkness & S. Bynum assignees of J. P. Vaughn locate the following land warrants Number 336 and 337 issued and signed by the Governor of said State and countersigned by the Comptroller of said State each bearing date the 22nd of Nov. 1852. In pursuance of and in accordance with the act of the Legislature of said State entitled an act to provide for the disposal of Five hundred thousand acres of land granted to this State by Act of Congress passed May 3rd of said year. I did run off and survey by lines running North, South, East & West on Mare Island situated South of Vallejo at the mouth of Napa creek in said State and supposed to be in the County of Solano, Three hundred & twenty "320" acres of land located by the said Joseph P. Vaughn and said assigns thereof. Which land so located surveyed and run off is bounded and described as follows, commencing at a stake on

San Pablo Bay on the Southern boundary of Sec. 23 in Range 4 West Township 3 North running from thence East 4 chains to the southwest corner of the South East Quarter of the South East Quarter of Sec. 23, running from thence North, 20 chains, from thence East 20 chains from thence North 20 chains striking a salt marsh on Napa Creek, from thence following the Sinuosities of the Marsh to a stake forming the North West corner of the N. E. Quarter of the N. E. Quarter of Sec. 23 from thence East to Napa Creek, from thence following the sinuosities of Napa Creek to a stake 1 chain South of the N. W. corner of the South East Quarter of Sec. 14 from thence N. 44° W. to San Pablo Bay, from thence following the sinuosities of the Bay to the place of beginning all of which is in Sec. 23 and 14, Range 4 West Township 3 North, containing an area of three hundred and twenty acres more or less being a part of a tract of land known as Mare Island the boundaries of which are more particularly described and set forth by the annexed plat of said survey marked "A"

In Testimony Whereof I hereto sign my name this 20th day of Nov. 1852.

F. R. Loring, Co. Surveyor
By Wm. Denton, Deputy
for Solano County.


Range 4 W. T. 3 N.

The within described land warrants are floated for the reason that the land upon which the same are located upon lands not the property of the United States, being a finally confirmed grant.

Charles Hastings, Assignee
and owner of said warrants.

State of California,
County of Solano.

This instrument of writing was rec'd by me for record the 22nd day of November 1852 at 40 minutes after 2 O'clock P. M.

Saishel Bynum, Co. Clerk.

WITNESS continuing: The school warrant found on Pages 114 and 115 of the same record is a survey on Mare Island and on the land opposite Vallejo, which is the neck of the island above the Navy Yard. This survey does not tie up to the other one on Page 39 by any evident survey line only just the general shape of the land; it ties up to the survey on Page 38 so that together they make a continuous survey of that portion of Mare Island.

(The document was offered in evidence, subject to the same objection and the further objection that no foundation had been laid, overruled and exception, and was received in evidence as "Plaintiff's Exhibit DD".)

PLAINTIFF'S EXHIBIT DD

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

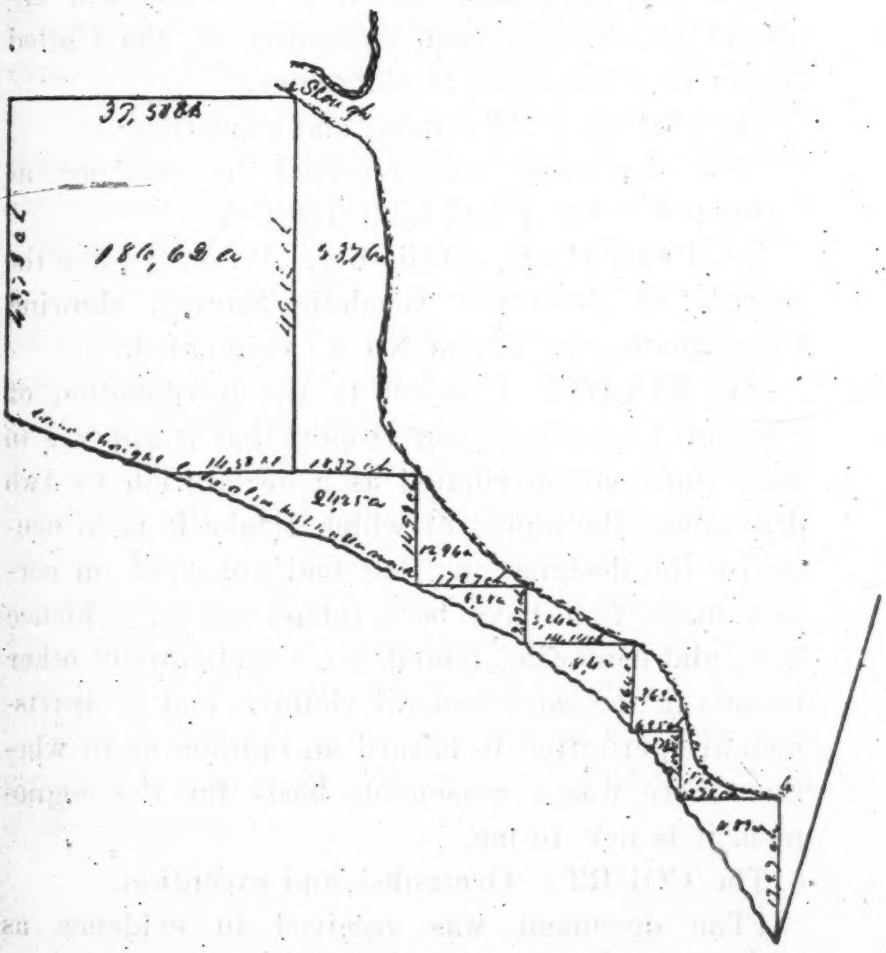
I, Hans Patton, County Surveyor of Solano County in the State of California being qualified do hereby certify that in pursuance of an act of the Legislature of California entitled "An Act for the disposal of five hundred thousand acres of land granted to the said State by an act of Congress," passed May the 3rd 1852 and at the request of Josiah Hanscom Esquire did proceed to survey and run off by lines running East, West, North and South three hundred and twenty acres of land Beginning at a point at the north end of Mare Island where the hill land stops and the tule sets in on the shore of San Pablo Bay and run N. to a point on Napa Bay marked on the *b*, thence northwardly along the shore of said Bay to a point on a slough marked *c* thence W. to point marked *d* thence south to the point on San Pablo Bay marked *e* thence with the shore thereof southeastwardly to the place of beginning and supposed to be in Solano County—and located thereon School land warrants number 151 and 274, for One hundred and Sixty acres each issued and signed by the Governor of the State of California and countersigned by the Comptroller thereof bearing date the 8th of June 1852 and 11th of Sept. 1852 respectively the first name issued to Frank Soule, and the other to Ed-

ward Byrne and assigned to the said Josiah Hanscom.

Reference is made to the annexed plat.

Given under my hand this sixteenth day of Nov. 1854.

H. Patton
County Surveyor
Solano Co.



A true copy of the original recorded November 17th 1854 at 10 O'clock A. M.

Jos. P. Vaughn, Co. Clerk.

Mr. PECKHAM: We offer a certified copy of the French Admiralty Map of 1844, of San Francisco, the original of which is in the Library of Congress.

Mr. KELBY: Objected to on the ground that it is immaterial, irrelevant and incompetent and on all of the other grounds heretofore stated, and on the additional ground that it is unauthorized, unofficial and has not been recognized by the United States as a map that is obligatory.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Ex- [254] hibit L-8-C".)

Mr. PECKHAM, continuing: We next offer the records of the Coast Geodetic Survey, showing where the name "Island No. 1" originated.

Mr. KELBY: I object to the introduction of this, on the ground, your Honor, that it appears to be a statement attributed as a declaration by two draftsmen, the object of which I take it is to neutralize the designations that had appeared on certain maps that have been introduced in evidence here, and connoting Island No. 1 and equally other islands in the same general vicinity, and if draftsmen are permitted to hazard an opinion as to whether there was a reasonable basis for the cognomen, it is new to me.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit L-31A".)

Mr. PECKHAM, continuing: We next offer from the records of the State Library, Gibb's map of 1852, also the Goddard map of 1856, from the State Library at Sacramento, also the official State Map of California by Whitney State Geologist in 1868, also the official map of the City and County of San Francisco, with an insert of San Francisco Bay, showing Mare Island, dated 1870, from the Coast and Geodetic Survey, also official map of the County of Solano, signed by the County Surveyor in 1872, also official State Geological Survey of California, J. D. Whitney, State Geologist, 1873, also Defendants' Exhibit "B" for identification.

Mr. KELBY: To all and every of which Exhibits "L-31A to L-38", inclusive, defendants object on the ground that each and every one of said proposed maps are immaterial, irrelevant and incompetent and not tending to serve any of the issues framed by the pleadings in this case and an attempt to change, alter and vary the description contained in the deed from Aspinwall, et al, to the United States and equally the patent of the State, and on the fur- [255] ther ground that they are cumulative.

The COURT: Overruled and exception.

(The documents were received in evidence and marked, respectively, "Plaintiff's Exhibits L-32 to L-38, inclusive".)

TESTIMONY OF CARL A. CARLSON

A witness for Plaintiff.

I am a Captain in the Civil Engineering Corps, United States Navy. I am now and have been for slightly over one year in the Bureau of Yards and Docks at Washington. I have had two tours of duty at Mare Island, the first in 1916 and the last in 1924. In 1916, I was in the Navy Yard about a year and a half and in 1924 a little over four years. I entered the Navy in 1903 and served at Navy Yards and Naval Bases on the Atlantic and Pacific Coasts and in the Hawaiian Islands, the Philippines, and about eight years also in the Bureau of Yards and Docks and on inspection duty outside of Navy Yards. Prior to entering the Navy, my training as a Civil Engineer has been as follows:

I graduated from the Case School of Applied Sciences in 1900, with the degree of Bachelor of Science and Civil Engineer, and I had three years' private experience before entering the Navy. I am familiar with conditions at the Mare Island Navy Yard. I know the territory embraced within Swamp and Overflowed Survey No. 34. The north end of 34 abuts upon the Navy Yard, what is now known as the Navy Yard fence and that fence is the southern boundary of Swamp and Overflow 569, involved in the Stuart case. I am familiar with the Freeman Survey. The Freeman Survey accords very well with the surveys of the Coast and Geodetic Survey.

Mr. KELBY: I object to that; they speak for

(Testimony of Carl A. Carlson.)

themselves. He is called here as an expert on maps.

The COURT: Overruled and exception.

WITNESS continuing: The Coast and Geodetic Survey is a survey of the exterior boundary of the high water line of Mare Island; [256] that is, the mean high water is what they seek to portray. The Freeman Survey is a segregation by so-called meander lines primarily for the purpose of determining the area and acreage of land involved in the property.

Q: I will show you defendants' exhibit for identification, No. 2, and call your attention to a delineation thereon of swamp and Overflow Survey No. 34, and also call your attention to a meander line and two arrows, "Shoreline 1852", and will ask you if you can state from your knowledge of the records of the Navy Yard whether that is a correct representation of the mean high water line of 1852?

A: No, that is a mistaken interpretation as to that line. We have earlier records, definitely defining that line in the compiled maps.

Mr. KELBY: I move that the answer of the witness be stricken out.

The COURT: Denied and exception.

WITNESS continuing: That line, properly interpreted, represents the junction of the high land with the low and marsh lands. It is clearly shown on the Sloat Board Map.

Referring to a line across the map, defendants' Exhibit for identification, No. 3, called "Line of

(Testimony of Carl A. Carlson.)

High Land", that does not represent the line of mean high water at Mare Island. It represents a contour partly due to filling in here. It is not an original contour line of any kind. It is the boundary of the filled land from the marsh land. This was simply a plan for the filling of that marsh land. This drawing is made primarily for another purpose, the only purpose indicated. It was simply a plan for filling in the marsh land, and that is all. The irregular shape represents the old steam engineering building, referred to quite often for a reference point, the first building erected in the way of shops. This approximates the south line of Swamp and Overflow Survey 34. This line is on Survey 34. [257]

Q: By Mr. KELBY: Captain, you have identified this map, I believe. State whether this map was not made by the Navy Yard at Mare Island?

A: It was made by the Public Works Official at Mare Island Navy yard for the purpose of indicating the area of the Navy Yard to be filled by dredging in anticipation of taking bids.

Q: What is the date of that map?

A: May 22, 1914. [258]

Q: Had any filling been done up to that time, so far as you know?

A: Yes, the line of high land is indicated here as an artificial line, indicating that previous to that there had been filling.

Q: Do you know what the character of the filling in was, either from your own knowledge or

(Testimony of Carl A. Carlson.)

from knowledge derived from records on file in your own office?

A: The filling outside of what you call high land or up land was largely excavation material from building sites, also material to be disposed of because the Navy Yard grade, to be of any value, must be away up above any ordinary line—sixteen feet above in the center, so that it takes quite a fill.

WITNESS continuing under questioning by Mr. Kelby: The natural elevation was increased by the fill about six inches.

WITNESS continuing under questioning by Mr. Peckham: Defendants' Exhibit for identification, No. 7, shows a detail of the areas along from the Steam Engineering Building on a larger scale and here the line is identified as the line of upland and tule. It looks like 1863, and the line marked 1863 Shore Line on the map (Defendants' Exhibit 4 for Identification) is the same line that is exhibited as "Line of Upland and Tule in 1863 in Defendants' Exhibit 7 for identification, is simply larger detail of Defendants' Exhibit 4 for Indentification.

Mr. KELBY: Q: What is the date of those exhibits respectively?

A: February 1906, Drawing T-188, and February 1906, Drawing, it looks like T-189. This is a very poor print. They are both made by an engineer named Rousseau.

Q: They were made here at Mare Island, were they? A: Yes.

Q: Do you know for what purpose they were made—from inspection of the maps?

(Testimony of Carl A. Carlson.)

A: The title of one is "Map of Mare Island between Steam Engineering Building and Swamp and Overflow Land 569." The other has marks showing the location of the shore line west of Steam Engineering Building.

Q: Do either of these maps show the location of the Machine Shop? [259]

A: Yes, both of them?

Q: Will you indicate that with the letter X?

A: On both of them?

Q: Yes. A: Yes.

WITNESS continuing: Referring further to Defendants' Exhibit "4" for Identification, the parallel and broken line called "Sand Shell Ridge" on that map represents the remains of the old, original sandy beach along the west side of Mare Island. That beach was largely depleted by the removal of sand for general purposes. The beach has been used ever since the yard started as a borrow pit for sand; that beach deposit was continuous throughout the length of Mare Island from the Machine Shop to the end of the Island. From the log of the yard, it is indicated that sand was first taken from that ridge about 1854 or 55, when they first started building.

Referring to the log of Mare Island now shown me, the record shows that on September 16, 1854, Commander D. G. Farragut took over the yard and at once commenced the work of constructing the Navy Yard; that practically from that time on sand was borrowed from this beach along the west side of Mare Island.

(Testimony of Carl A. Carlson.)

Mr. KELBY: Q: Have you examined the records that make up the file that I now hand you?

A: Yes.

Q: Will you point to the particular one that refers to the borrow pit?

A: We had to photostat the whole page to get a single entry. The entry of January 11, 1855 states: "Men employed as yesterday, except a sledge placed for hauling up sand from the beach." On January 12, 1855, "Commenced hauling up sand from the beach." January 13, 1855, "Hauling up sand from the beach."

Q: Is there any entry in any book or is there any entry in the file that you now have which shows the location of the beach?

A: The only place there was a sandy beach that they could possibly haul any sand up from was along here, starting along here, because there is no sand on this side, and naturally they would get the sand which is closest by.

Q: Are you able to show in the file that you now have, the location [260] of this borrow pit to which you have alluded?

A: I used the term "borrow pit" in a modern sense, any place you go to get material you call a "borrow pit". They do not use that term, they call it hauling up sand, which is the same thing.

Q: Didn't you state that the borrow pit extended up to the north-western part of the island?

A: We consider that whole sandy beach a borrow pit, as place to go and borrow material.

(Testimony of Carl A. Carlson.)

Q: When you said the northwestern part of the island, did you have reference to 34?

A: Yes, and beyond, right along.

Q: Right along? A: Yes.

Q: Even up beyond the southerly line of 569?

A: Yes.

Q: I will ask you this, do the remains of that beach still exist?

A: Yes. The beach can be followed on Swamp and Overflow 569 beyond the Navy Yard fence.

(The document was received in evidence as "Plaintiff's Exhibit EE".)

PLAINTIFF'S EXHIBIT EE.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed sheet is a photostatic copy of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for September 16, 17, 18 and 19, 1854, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

1854

Log Book at U. S. Navy Yard, Mare Island

September 16th, 1854.

Commander D. G. Farragut took command of the Island this day, and forthwith warned off all the Squatters viz. Turner, Roy, Vera, Gilbert and Antonio Pinto.

Weather very fine; but warm.

Thermometer 86°

Sept. 17th, 1854.

Looked around the Island for the localities specified in the plan of the Navy Yard—employed in ascertaining the amount of property on the Island, that could be advantageously used by the Government.

Weather fine, but warm.

Thermometer 84° to 86°

Sept. 18th, 1854.

The U. S. Sloop of War "Warren"—Lieut. Comd. D. McDougal Comd. came up today to be moored at the Yard for the use of the Yard and a Store Ship and for the accommodation of the officers of the Yard.

Employed a carpenter to work on the Flag Staff (Vera). The weather very fine but warm. Thermometer 90° at noon.

Paid $500 for towing the Warren up.

Paid $192 for Pilotage.

Sept. 19th, 1854.

Fine day, made arrangements to dock the "Warren"—employed 2 or 3 more men to work on the Yard to fix foundation etc. for Flag Staff. Sent to San Francisco for lumber and other appliances to work with.

Thermometer 86°

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed three (3) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for December 30 and 31, 1854, and January 1, 2, 3, 6, 7, 8, 9, 10, 11, 12 and 13, 1855, on file at the Navy Yard Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

1854-5

Log Book at U. S. Navy Yard, Mare Island

Decr 30th, 1854.

Fine morning but cool. Ther. 40°. "Caledonia" finished discharging piles. We are out of square timber and obliged to suspend work on the Capping Wharf No. 3. Finished the foundation of the Southern wing of the Smithery and commenced on the Front foundation.

Decr 31st, 1854.

At 2 a. m. commenced raining and continued to rain the remainder of the 24 hours a steady rain. Ther. .....

January 1st, 1855.

At 1 a. m. commenced blowing from the So. and E. and at 3 a. m. wind shifted to South. The Brig "George Emery" broke from the moorings of the piles and swung off in the stream and let go their anchor, but the gale continued and she draged her anchor over to the North Eastern shore. At 4 the "Warren" began to drag the Port stream anchor off shore and forge ahead, but the 3d anchor held on and she only swung off shore about 100 feet.

In the Yard the covering of Hay Stack was mostly blown off. The frames were shaking and bent but not blown down. In Vallejo some of the houses were unroofed and some blown off the foundation blocks. Most of the workmen's boats were stoved, so that they could not cross to the Yard. The Bark "Caledonia" was blown once on the Mission road and still lies there. In the evening rec'd public letters from the Department, also plans of Timber Shed, Carpenter's Shop and new plan of the Yard.

Jany 2d, 1955.

Fine day. Ther. 48°. Had the "Warren" re-moored by planting a heavy anchor on the shore for Port Stern fast. Sent a Ridge Anchor to the Bark "Caledonia" to haul her off the bank, so that she could make sail. Only a few men employed today replacing hay roof, etc. Bark returned the Ridge. Commandant went to San Francisco on duty.

Jany 3d, 1855.

Rainy weather for the three last days. The men have all been employed as usual on the foundations

of the 3 buildings, Store House, Timber Shed, Carpenter's Shop and Smithery. On the 4th finished the small scow and launched her. On the 5th in the evening Comd't returned from San Francisco after having completed the contract for Store House and Timber Shed.

Jany 6th, 1855.

Fine day. Ther. 37°. Cold weather for this climate. Ordered the rough Carpenter's Shed to be built between the foundations of Nos. 40 and 46.

Jany 7th, 1855.

Rainy day. Ther. 40°. Sunday.

Jany 8th, 1855.

Wind fresh from the E. At 12:30 commenced raining and continued to do so the remainder of the day. The laborers made only ¾ of a day. Took on 20 men.

Jany 9th, 1855.

Cloudy, cold morning, but began to clear off a little by noon. Wind still fresh from the E. Men all employed as usual on the foundations and Avenue, pile driver at pile driving.

Afternoon the weather clear and fine.

Jany 10th, 1855.

Foggy morning but fine day. Wind still to the E. Men employed as usual on foundations. Nothing occurred worthy of note.

Jany 11th, 1855.

Cloudy, cold day. Ther. 40°. Men employed as yesterday. Except a sledge placed for hauling up

sand from the beach. Rec'd by the Napa City Steamer, 8 pairs of car wheels.

Jany 12th, 1855.

Ther. 45°. Fine day except that the wind is still from the E.—blowing fresh. Men employed as usual. Commenced hauling up sand from the beach.

Jany 13th, 1855.

Fine day. Ther. 44°. Wind blowing fresh from the E. and has blown fresh all night. Men employed as usual on foundations and avenue. Carpenters on wharf and shed for carpenters. Hauling up sand from the beach. Rec'd 50 bbls. of cement and 12 feet 4x4 scantling.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed two (2) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for June 2, 3, 4, 5 and 6, 1855, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

Log Book U. S. Navy Yard Mare Island

June 2, 1855

Fine day, & a little cooler than yesterday, all hands at work. A fine breeze blowing from the Sou. W. Comdts visited the Massachusetts to see what re-

pairs were wanting, &c. Ordered the Derrick to be got ready. Rec'd the timber for the "Massachusetts".

June 3, 1855

Sunday. Fine day. Attended Divine service at the Church in Vallejo. Mariposa arrived with brick.

June 4th, 1855

Fine day but rather warm, smoky. Visited the Massachusetts to look at the distribution of weight in the Hold before taking her on the Dry Dock. Finally decided not to take her on, as it was not of sufficient consequence. The Engineer said he could get along very well without it.

Placed a Target on the Island for Massachusetts to fire at, across the Tuly on the Northern end of the Island.

June 5, 1855

Fine day, smoky appearance. Sloop load of sand arrived from the Yard. Hard pressed for wharf room to discharge vessels. Pile driver is at work driving piles as fast as possible, but the earth slides from the banks. Carpenters are framing the roof of the Smithery & making window sashes. Comd't went on board the Massachusetts to try the bulwarks by firing her guns at 10 A. M. Dr. Grumm visited the Yard at 12 M. Lunched on board the "Active" at 1-20. Comd't went on board the Massachusetts & commenced firing the starb'd guns at the target—distance about 1100 yards, found the bulwarks stood perfectly well, except the nails drew in the middle of some of the planks on the outside which are

only 1½ inch stuff. Firing well generally. Any shot would have struck the hull of a ship, but none struck the target. Fired 3 shells, all of which exploded five times. Cut the fuzes & explained the minutia of the fuze.

At 2 P. M. Dr. Ashe the Navy Agent came up & commenced paying off the men.

Mrs. Sears had the first born on Mare Island.

June 6th, 1855.

Fine day, very windy during the night, a fresh breeze all day. At 8 o'clock the Qt. Master schooner came off the Dry Dock & the Bark went on for repairs. At 4 P. M. the Bark came off the Dock, at 4 got up the Derrick.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed two (2) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for November 14 and 15, 1873, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN.
Public Works Officer.

Navy Yard, Mare Island
Friday, November 14th 1873
Part "First"

Weather clear and cool wind fresh from the West.

Part "Second"

" Clear and pleasant wind light from West
The Schooner "Emma Caroline" Capt.

A. Smith, arrived from San Francisco at 10 20 am with lumber for Y. & D. The Jamestown Steam Launch left for Sonoma Creek with 6 carpenters and material for putting up a Government House on Government land. A light rain shown during the watch.

Part "Third"

" clear and cool wind fresh from the North The Jamestown Launch returned from the Tuiles at 10.30 P.M. Pumping out the Cofferdam to day.

Thermometer		Barometer	
Sunrise	54	Sunrise	30-02
Meridian	64	Meridian	30-00
Sunset	68	Sunset	30-00

"Tides"

Low tide at 3.30 am
High " " 10 "
Low " " 4 P.M.
High " " 10.30 "

	Workmen	
Construction	Employed	445
Yards & Docks	"	369
Steam Engineering	"	112
Provision & Clothing	"	5
Equipment	"	51½
Ordnance	"	19
Navigation	"	1
		1003

the rain fall for the last 24 hours was 00015 of an inch.

Navy Yard, Mare Island
Saturday, November 15th, 1873

Part "First"

Weather clear and pleasant wind light North

Part "Second"

" clear and pleasant wind light from East. The Schooner "George Woods" Capt. W. Elliott arrived from San Francisco at 8 am with 400 Barrels of Lime for Y. & D. The Jamestown Steam Launch left the yard at 9 am with lumber & carpenters to finish House on Tulies. Also carpenters and material was sent up on the tulies about a mile above the Foundry on the San Pablo Bay side to build a Government House on land claimed by the Government. The Ship "Coquimbo" Capt. C. Eyer arrived from San Francisco at 10.30 am with Piles & Timber for Y. & D.

Part "Third"

" Clear and cool wind light from East. The Jamestown Steam Launch arrived from the upper Tulies at 4 P.M. all work being finished. The Schr. "George Woods" sailed at 4.30 P.M. The Steam Pilot landed freight for the yard, pumping out cofferdam to day.

Thermometer		Barometer	
Sunrise	56	Sunrise	30-14
Meridian	68	Meridian	30-22
Sunset	66	Sunset	30-24

"Tides"

Low	4 am
High	10.30 "
Low	4.30 P.M.
High	11 "

Construction Workmen Employed		487
Yards & Docks	"	3.13
Steam Engineering	"	111
Provision & clothing	"	5
Equipment	"	50½
Ordnance	"	19
Navigation	"	1
		936½

James Tilton, Charles Schafe, Michael McNamara, Watchmen are occupying the new building on the tulies above the Foundry. John Charlton, Watchman is occupying the new building on Sonoma Creek.

WITNESS continuing: The configuration of the surface here has been changed in certain respects since 1853. The configuration of swamp and overflow survey 34 has been changed by being leveled off and cultivated but the remainder of this beach on 569 is more perceptible than it is now on 34.

Mr. PECKHAM: We now offer a letter from the files of the Navy Yard from Commandant John Rodgers to Commodore C. R. P. Rodgers, U. S. N., Chief of Bureau of Yards and Docks, Washington, D. C., dated September 26, 1873.

Mr. KELBY: We object to it as immaterial, irrelevant and incompetent and not tending to support any issues in this case.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit FF".)

PLAINTIFF'S EXHIBIT FF.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed eight (8) sheets are photostatic reproductions of a copy of a letter from the Commandant, Navy Yard, Mare Island, Cal., to the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., dated 26 September 1873, including endorsement on filing jacket, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

No. 230.

Commandant's Office
Navy Yard, Mare Island, Cal.
26 Sept. 1873.

Sir:

I have the honor to enclose herewith copies of papers, which are on file in the Land Offices here, in regard to the extent of land comprising Mare Island.

As the United States bought for naval purposes, Mare Island, "including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays, creeks and other water privileges etc., thereunto belonging," the intention of possessing and retaining all the tule land is as clearly expressed as its intention to possess any other part; what it paid for, it must be supposed to have wished to own.

The question remains what is Mare Island?

The Land Commissioners of the U. S. in their confirmation of title to Bissell say Mare Island "being an island is bounded by the waters edge."

The title deeds for Mare Island convey to the Navy Department all the tule or lowland and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same.

The Board sent by the Navy Department state, in their official letter, that "the island, including the tule opposite Vallejo, contains about nine hun-

dred acres, in addition to a large tract of tule extending towards Napa and Sonoma."

Thus it appears that the Government intended to purchase, and did purchase, an immense tract of tule land extending towards Napa and Sonoma: the boundary is tersely expressed by saying: "Mare Island being an island is bounded by the water's edge." In the official map of the State of California, ordered by Act of Legislature in 1853, and published in 1854, it is thus bounded, being laid down as about ten (10) miles long. In the map published by Warren Holt, of San Francisco, in 1860 its dimensions are the same.

It has been alleged that Castro, the Mexican, from whom the vendors to the United States derived their title had, himself, no valid title, but, even if true, this cannot affect the rights of the Government; for if Castro had no title, then the United States, in its own right of conquest and purchase, had acquired the ownership from Mexico.

Besides the U. S. Land Commissioners Messrs. Thompson and Farwell decided that Bissel's title derived from Castro was valid.

The tule lands in question have a great prospective value to the government for artillery practice. Until recently, the Navy had no site upon the Atlantic Coast where the needed trials of Ordnance could be made.

Here, under the deed from Aspinwall and others, a perfect range was bought, long enough, about seven miles, to test any imaginable improvement in

artillery. A firm sand beach borders the whole of this tule land on the west side.

The ownership of this land is desirable to the Navy that it may have necessary control of the water front, that it may prevent the erection of structures projecting into the stream that would deflect the currents, and damage the harbor, and that it may hinder the establishment of objectionable manufactories, or habitations for junkmen or liquor dealers.

It is stated that the tule land in question was bought from the State of California, by private parties, in the year 1857.

As it is very desirable that the question of title should be settled and the boundaries of the Government property clearly defined, I would suggest that the matter be referred to the U. S. District Attorney at San Francisco, who, from his familiarity with the land titles and laws of California, will be able to present to the Government a clear synopsis of the merits of the case.

The Act of Sept. 28, 1850, called the "Arkansas Swamp Land Act", is relied upon to establish that the title laid in the State of California and not in the United States; and Castro it is said, could never, under Mexican law, own the title to tule land. However this may be, the U. S. Commissioners decided that Mare Island is bounded by the water's edge, and the Board sent out to examine and report upon the proposed purchase declared

that the island included an immense tract of tule land extending towards Napa and Sonoma.

In regard to the Arkansas swamp land act, under which California sold the tule lands of Mare Island, it was a necessary condition to the operation of the Act that such land should be unsold. Therefore, if Castro, as decided by the U. S. Commissioners, owned the land, the State of California could not acquire it under said Act. But when the State of California, April 28, 1855, passed an Act to provide for the sale of land belonging to the state, Mare Island, including the tule land in question, had, two years previously, already been sold to the United States.

I also enclose a copy of the patent whereby the State of California conveys to Dana N. Darlington 164 55/100 acres of the tule land herein referred to, dated March 18, 1857. This land adjoins the Foundry on this Yard. We have been admonished not to take sand at a distance of some fifty feet from that building.

The accompanying charts, forwarded by mail, with the enclosed papers, will fully explain what I claim as Mare Island.

I am

Very respectfully,

Your Ob't Serv't

JOHN RODGERS,

Commandant.

Commodore
C. R. P. Rodgers, U. S. N.,
Chief of Bureau of Yards and Dock,
Washington, D. C.

Commandant's Office
Navy Yard, Mare Island
Rodgers, John
Commandant

In relation to titles and boundaries of Mare Island, enclosing copies of papers relating thereto, and forwarding charts by mail.

III.

WITNESS continuing: I recognize the photograph now shown me as an aeroplane photograph of Mare Island. It truly represents the [261] lay of Mare Island at present. The long patch of white running along the western rim of Mare Island represents the area between the original sand ridge and the dykes that were later constructed for reclamation purposes and you can see the trace of the road right through there. The color is apparently due to the height of the grass. It shows very clearly. The line of the old borrow pit deposit of Mare Island is in back of the levee and the levee was built years later, after the beach had built up from mining debris and silt from the river. The deep white strip ends at the Navy Yard fence and everything south of that is in Swamp and Overflow No. 34. This copy shows the improvements now on the

(Testimony of Carl A. Carlson.)

land in controversy on a small scale. I am familiar with the improvements on the land in controversy. I now mark on the map with an arrow the location of the Machine Shop. This is an aeroplane photograph and does not show the line of the high land as it existed in 1852. I am very familiar with the location of the high land or the upland as it existed in 1852 as derived from maps, that is, I am familiar with them from the early records. Survey 34 would start about here. The large black spot is the steam engineering building, and Survey 34 would run from there along the sand ridge up to the present Navy Yard fence. The white surface indicates one of the basins used for the deposit of hydraulic dredging due to the maintenance work in Mare Island channel. It is built to retain the fill and in that way gradually bring it up to what we call a work shop grade. It does not represent a natural condition, but it is an artificial fill. Such fills are not completed at any one time. It is a progressive operation. They put in a little, perhaps a few inches of sediment—6 inches—and then six months later put in more, because it is a convenient dump for the deposit of the dredger spoil. This photograph was made on January 12, 1932.

I have prepared from the records a list and location plan of the improvements on the land in controversy. It was prepared dur- [262] ing September, 1921, under my direction by several individuals, but checked by me. It is substantially correct to the best of my knowledge. I believe the principal improvements on this land are set forth

(Testimony of Carl A. Carlson.)

in the scale headed: "List of Improvements". I am acquainted with the cost of each improvement. There is a table giving the approximate cost of each improvement on the plan.

(The document was received in evidence as "Plaintiff's Exhibit GG".)

The table shows the list of improvements, what the improvements consisted of, the number of it designated by a circle on the map, the date built, the approximate cost, whether or not it is still standing, and under "Remarks" whatever was necessary to make it clear. The existing Navy Yard fence between 34 and 569 was built in 1914. The first improvement built on 34 was an artillery target built by Commodore Farragut in 1855. The road along the beach was the next improvement, built in 1855. The date appears with respect to the building of each improvement upon this location plan.

WITNESS continuing: The acre content of Mare Island south of the upland is something around 750 or 800 acres.

Mr. PECKHAM: We offer this photograph in evidence.

Mr. KELBY: Objected to as incompetent, has no relation to the time of the Land Grant Act of September 28, 1850.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit HH".)

WITNESS continuing: I am familiar with Defendants' Exhibit 6 for identification. The broken

(Testimony of Carl A. Carlson.)

line on this exhibit running from the Steam Engineering Building to a place called the Tanks [263] called the original high water line, represents the line of extreme high water and the line of the upland. A similar line on the east side of Mare Island, running from 15th Street in a meandering line to 20th Street and down again to the dot near the Ammunition Depot, also labeled "High Water Line" is the approximate location of the extreme or extraordinary high water line and the line of upland. It is not strictly correct because of the improvements, but for the purpose of this line I had it put on the map so as to have a rough guide as to where the higher firm ground originally was in putting out new structures and I had them put on improvements. The purpose was to indicate the general foundation of buildings that were put on and to mark the line of extraordinary high water, which would be also the line of upland. It is substantially correct and was prepared by the Navy Yard, and is an actual map of the Navy Yard at Mare Island, showing conditions on June 30, 1925, a record of improvements from year to year.

Referring to Defendants' Exhibit "8" for identification, this document is a photostat of a tracing of a portion of Mare Island, prepared October, 1900, to accompany papers relating to the claim of E. H. Sawyer to 164.55 acres of Swamp and Overflowed Land. The tracing paper now shown me apparently is the same as Defendants' Exhibit "8"

(Testimony of Carl A. Carlson.)

for identification because I notice the tracing has the same omission.

(The tracing was marked "Government's Exhibit II for identification".)

WITNESS continuing: The green area on this exhibit just slightly north of the red area, which purports to have been surveyed by H. Patton, Surveyor, in June, 1855, of land issued to David N. Darlington by the State of California, March 18, 1857, and platted from Patton's notes.

Q: I call your attention to a legend on the map: "Red lines show the same area as the green lines, but it is plotted to agree [264] with the survey of the land immediately adjoining on the north made by William W. Fitch, County Surveyor of Sonoma County, September 28, 1869, and with the topography as described in Patton's notes." Which is the red survey? A: This area here. Q: Which one best accords with the physical features of Mare Island? A: The red one.

WITNESS continuing: The line on the tracing of the original mean high water of Mare Island follows the water representation on the water side of the red survey. The Fitch survey is a fair representation of the line. The easterly line is also a fair representation of the mean high water line on the east of Mare Island. This red is the same survey as the green, but taking Patton's survey as the basis for starting, you get Fitch's location. This is still the Patton survey plotted by Fitch. It is still a Patton survey.

(Testimony of Carl A. Carlson.)

WITNESS continuing: My understanding of upland is any land that is about four or five feet above the ordinary mean high water—roughly, it runs from four or five to eight feet up to 20 or 30 feet along back on the Island. The word "Upland" in line of upland would convey to me the information, land above mean high tide. The line dividing the land above mean high tide and the land below mean high tide is all above mean high tide. It is the dividing line between lowland and upland—it is all above mean high tide. I mean that the land on both sides of that line would be above mean high tide. The levees and canals shown on the map is what we call the Cross Levee built in 1897, when Dr. Cross came down here and assumed he was closing in a part of 569; he got off half a mile; he made his own survey and got off half a mile down on to 34 and he thought he was running the south line of 569. He dug this canal which connected the waters of San Pablo Bay with those of Napa River and put the levees in to reclaim that piece of land.

Referring to Defendants' Exhibit 4 for identification, the canal and levee are represented on that map. The water-way indicated by the word "slough" is artificial; that is probably where the bridge might have gone in and come up this way. [265]

Mr. KELBY: Q: The term "Line of upland" has no relation to tides, has it? A: All the lines have relation to tide. Q: I mean in a specific sense? A: Yes, because all of the elevations on the topographic maps are given so many feet above the

(Testimony of Carl A. Carlson.)

plane of mean high water or any other reference place you may use. Q: But when the words "Line of Upland" are delineated on a map, professional map, have they reference to high tide or low tide or mean tide? A: Their relation does not change with respect to any of those tides. Those tides are merely stages of measurement. The land is still there.

(Defendants' Exhibit 8 for identification and Government's Exhibit II for identification were received in evidence as "Plaintiff's Exhibit II".)

WITNESS continuing: My understanding of shore line is any specific line of measurement for determining the intersection of the water line with the land. We ordinarily start with the shore line of low water and come up to the shore line at any other stage of the tide. I would not use the words "Shore Line" to indicate the line of highest high water. I would use the words "Shore Line" to indicate the line of mean high water, but I would mark it "Shore Line, at mean high water." Without the indication of what the shore line is, the words "Shore Line" do not mean anything—it must be identified. I have a tracing of a map of 1861 of the Navy Yard which I now produce. It is from the records of the Bureau of Yards and Docks. It is in the records of the annual estimate, I believe, which you had sent in from the Navy Yard. The dark line on this map, surrounded by blue, indicates the shore line and also is apparently used for the bluff as well. This map is not marked to show any indication of where the mean high water line

(Testimony of Carl A. Carlson.)

be it because of the Coast Survey, and the Navy Yard used mean high water. The blue indicates the division in between the land and the water at that [266] stage of the tide that is stated, or mean high water. The staggered line or meander line along the east side of Mare Island, called "Edge of Upland" corresponds to the edge of upland shown on the early topographical map of Mare Island, which is the Cutts map, and it distinctly shows there that it is a line of division between land because the water is colored separately.

Mr. KELBY: Do you know when this map was made?

WITNESS continuing: It was made September 14, 1861, forwarded by letter from Captain Gardner, dated September 14, 1861, to the Bureau of Yards and Docks. The maps of Mare Island were made fundamentally from original surveys, also basic maps originally and later Coast Survey Maps. It is better than a compilation of maps because it is definitive of the land. It does not simply depict something that is found in something else, but shows the condition at that date. This was an instrument survey, but it does not have to be done every year.

Q: Where, approximately, is the location of the land in controversy? A: Starting with this line of upland and running up here. Q: Is the line of upland legend on that map? A: It is marked "Edge of the Upland", in dots; anyone would interpret it to be the same line because of its relation to the

(Testimony of Carl A. Carlson.)

blue shaded line. The title of this is "Sketch of Mare Island Showing Location of Navy Yard and Magazine." Q: That is in 1861? A: 1861.

(The document is received in evidence as Plaintiff's Exhibit JJ".)

WITNESS continuing: I have a tracing of the map of 1872-73 of the Navy Yard, of which I produce a photostatic copy. The "Line of Upland and Highest High Water" indicates a line of extraordinary high water. We have such water sometimes, but once in ten years; sometimes they may come a few years apart but any extreme flood or unusual stage of the tide would be extreme high water; that would also correspond to the nearest line of upland because the water would [267] get up on the upland with such extraordinary tide. The similar line on the east shore of Mare Island, called "Line of Upland" and "Line of Highest High Water" is identified with that. Both of these lines very closely, as maps go, would represent the original line shown on the Cutts topographical survey. The word "tule" in between that line and another line marked "Line of Tule" indicates marsh land above the line of mean high water, showing this is the bank here, probably six inches to a foot and this flatter marsh running in. sloping up to the upland. The map-maker indicating by "Line of Upland" means the line of highest high water and he has so marked it. The tule land to which I have referred is located right off Mare Island, originally on the easterly side in front of the hospital. The word "tule" up here north of the line marked

(Testimony of Carl A. Carlson.)

"Line of Upland and Highest High Water" indicates the general low marsh land bordered with tule.

(The document was received in evidence and marked "Plaintiff's Exhibit KK".)

WITNESS continuing: The Coast and Geodetic Survey have established three bench marks at Mare Island. I recall praticularly the one on the dry dock coping. A bench mark is any well fixed point from which the elevations can be measured or run to other points on the land or water. Tidal observations are referred to a bench mark. In order to determine the datum plane of mean low water the mean of the lower low water, we generally use the mean of the lower low, the same as the Coast Survey has zero. They have a tide gauge at Mare Island. The present gauge has been installed since about 1918. Before that it was installed at the Independent Wharf, but they have continuous tidal observations for about twenty-five years. The best records of any place in the vicinity. I have prepared some charts of tidal variations during the typical months of that period. I have three plates plotted for convenience in readings taken from the original tidal records [268] of Mare Island. One is marked Plate 5, Tidal Regimen, Mare Island Straits for the representative month of November, 1929. Plate 6 is for the rainy season month of February, 1905. Plate 7 is for the dry season month of June, 1905. The spring tides are the two tides that occur immediately after the new and after the

(Testimony of Carl A. Carlson.)

full moon in every lunar month. They have a peculiarity at Mare Island and on the west coast in that the two high tides of that day and subsequent days do not reach equal elevations. One tide goes high and the other is low, about one-third or one and one-half feet in height. It runs one-third to one and one-half feet lower. The high tide in the morning and the high tide in the evening will reach different elevations. The astronomical neap tides are the two tides that occur immediately following the first and last quarter of the moon, that is, the time interval between the change is the full of the moon or between the new moon and full moon, that is, seven days after the new moon and seven days before the full moon; seven days after a full moon and seven days ahead of the new moon, that is the lunar cycle. The neap tides are lower than the spring tides. Mean high tide is the plane to which the average of all of the high tides, both neap and spring, for every day in the year would reach, the average of all of the high tides throughout at least one month and probably for several years' observation, to determine the plane of mean high water to any degree of refinement. The ordinary high water mark is synonymous with mean high water mark or medium high water mark. Originally this was not so but due to legal interpretation, the wording of ordinary neap tides was carried over to mean the same as medium or mean tides. We call the datum plane of mean lower low waters at Mare Island 100 even. The Coast Survey would call it zero.

(Testimony of Carl A. Carlson.)

The coast survey monument at the dry dock gives the height of the mean high water above that datum plane as five and one-half feet. We are now using 5.8. We have used 5.6—it depends on the length of the series of observations and the particular location of the tide [269] gauge. For instance, up Napa River the plane of mean high water would be still higher. The further you go up the Napa River, the higher becomes the plane of the mean high water. At least one month of observation of the tide is the minimum necessary to establish mean high water, that is, fifty-seven tides or so. I am referring to one lunar month and the tide should be observed at two-hour intervals, that is only an approximate determination.

I now produce plates showing tidal elevations. The plate representing the month of November, 1929, and the month lined up into thirty days is correct. For each of the days there is a line indicating height of the tide and as the tide stops on each day there are lines platted to show the highest point of the tide on those days. On the first we have a low tide reaching about five and one-half feet and the higher tide reaching six and one-half feet. On the second, the higher tide reaching 6.8 and the lower tide falling to 5.3. Each day the dotted line is one tide and the solid line is the other. On the 7th of the month are indicated the transition tide, where both tides occur; that is they come to the same height. About two days in the month, the 7th and the 23d, at Mare Island, on the West

(Testimony of Carl A. Carlson.)

Coast, you get two high tides that are about equal and for the rest of the time they vary from a foot to a foot and a half. There are many factors besides the attraction of the sun and moon that affect the behavior of the tides at Mare Island, such as the configuration of the coast line, the direction of prevailing wind, the condition of floods in the San Joaquin River and Sacramento River and Napa River, all those combined to influence the behavior of the tide at Mare Island.

On Plate 6, which I have selected because it is the same year as the Rousseau Map was made, we can go back in these records which are readily available so that we can plot them with great accuracy. The mean high tide for the month of February would be above the ordinary plane of high water, whereas the month of June shows a marked [270] contrast.

The construction of artificial works on Mare Island, started by both Government and private parties, is an element that enters into the plane of the tide. The checking and enlarging of the tidal prism influences the level to which the tide will rise. The erection of artificial works generally tends to choke it. The year 1897 is the date that I am familiar with as being the date when works of reclamation were constructed on land claimed by the Government at Mare Island. From official records relating to words on 34, the reclamation work consisted of throwing up a levee so as to exclude all of the tides, flood and extraordinary tides and high spring, in

(Testimony of Carl A. Carlson.)

other words, to exclude the water entirely. The reclamation of these lands, consisting in the erection of these levees kept off all tidal waters of the low lands of Mare Island. The effect of such a process on the levels of Mare Island is that the land is deprived of its regular, natural flow and ebb process and dikes off, depending upon the character of the soil. It dries and shrinks and settles. It varies a great deal with the character of the soil and it continues over a long period of years. The walling off of the water from the land prevents any increment to the land from silt in times of flood. It also causes a settling of the soil by the evaporation and abstraction of the water. I had a topographical survey made of the land at Mare Island at the neck of the island between the Machine Shop and the northerly limits of 34, that is, took a series of levels with a level and rod over the area of 34 when I was stationed there in 1917. Last year I had a series of levels taken at cross sections along this same land. The result of the running of those levels indicated a gradual but marked lowering of the lines of elevation of the land. That the line was lower in 1931 than it was in 1917, and the line of 1917 was lower than the line of 1906. We had the Rousseau Survey showing the elevation in 1906, showing definitely the lines of elevation over that period of years. [271]

Mr. KELBY: I submit, if your Honor please, that while this is very interesting, as well as instructive, that it is incompetent, not tending to sup-

(Testimony of Carl A. Carlson.)

port any issues in this case, and I object to this testimony on those grounds.

The COURT: I suppose it has something to do with showing swamp and overflowed lands. Overruled and exception.

WITNESS continuing: I was a member of a party, including Mr. Peckham, who picked up the line of the Dyer Survey of 1863 in July of last year. That survey ran the line of Reservation No. 7 approximately as indicated in the Smith Board report and that also ran the line of President Fillmore's Reservation No. 7. This called for me to pick up the east line of Reservation No. 7, running from Benecia parallel with Mare Island Straits to a point 800 yards north of the northern post high hills north of Vallejo and opposite the north end of Mare Island.

Mr. KELBY: I object to that as incompetent and move to strike it out.

The COURT: Overruled, denied and exception.

WITNESS continuing: That point fixed by Dyer is the point 800 yards north of the northernmost high hills north of Vallejo and opposite the survey of the north end of Mare Island and thence to the Straits. We picked it up very well, possibly within fifty feet. When we looked through the telescope on the level or transit, we picked up the Bascule Bridge at Sonoma Creek, and that bridge is on the toll road between Mare Island and Tubbs Island across Sonoma Creek.

Q: Was that point opposite the north end of Mare Island, according to the Smith Report and

(Testimony of Carl A. Carlson.)

President Fillmore's Reservation, north or south of Swamp and Overflow Survey No. 34?

Mr. KELBY: I object to that as calling for the conclusion of the witness and not the best evidence.

The COURT: Overruled and exception. [272]

WITNESS continuing: It is shown on the map there as plotted fairly accurately. It is shown in this description to be three-fourths of a mile north of 34. In fact, the hills here are such that you cannot see anything of 34 from here. This is a high ridge of hills. Your view would be up this way to get a view on the upper end of the island.

Mr. PECKHAM: I offer in evidence a letter from the records of the Navy Yard of John Rodgers, Rear Admiral and Commandant, to the Board of Surveyors of Solano County, November 25, 1873.

Mr. KELBY: I object to the introduction of that letter on the ground that it is immaterial, irrelevant and incompetent and on the further ground that it is self-serving and it is simply a declaration on the part of the United States which would not warrant it in law and is not binding on the defendant in this case and is overthrown by a patent which has been issued in this case to the State of California, inuring to the benefit of the defendant.

The COURT: Overruled and exception.

(The document was received in evidence as Plaintiff's Exhibit LL".)

PLAINTIFF'S EXHIBIT LL

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

(Testimony of Carl A. Carlson.)

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Commandant, Navy Yard, Mare Island, California, to the Board of Supervisors of Solano County, under date of November 25, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN
Public Works Officer.

August 11, 1931

(Copy)

Navy Yard, Mare Island, Cal.
November 25th, 1873.

To the HON. BOARD OF SUPERVISORS
of Solano Co. State of California.

Gentlemen:

Certain persons having petitioned to your Honorable Board desiring to adopt measures to reclaim tule land appertaining to Mare Island.

And as your Honorable Board has appointed the 3rd day of December next for the hearing of said petition.

I feel it my duty, hereby to notify you that this land is claimed and occupied by the U. S. under orders from the Navy Department of the United States at Washington, D. C. the same having been purchased January 4th, 1853, after the Commissioners of the U. S. under the Act of Congress appd. March 3d, 1851, had confirmed the title under which

(Testimony of Carl A. Carlson.)

the United States now holds the land.

I further feel it my duty to protest against any action antagonistic to the ownership and possession by the Navy Department of the U. S. of Mare Island and the tule thereto belonging as well as in the words of the deed, "its waters, creeks, harbors, bays, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging."

I am, very respectfully,

(Sgd) John Rodgers,

Rear Adml. & Commandant.

WITNESS continuing: Referring to the Plates 5, 6 and 7, showing the tidal regimen for the month of October, 1929, the month of February, 1905, and the month of June, 1905, the month of November was selected as typical or representative of the average. The months of February and June were selected to illustrate the variations in one year between just a few months. The year 1905 was one of a 40% excess rain fall over normal. It shows up very well in the curve and particularly in February where the tides reached a higher elevation than they did later in June. The others in the summer or dry season, which are the average of all the tides, will be lower. That is characteristic of any tidal regimen where it is made up of tide, river and wind combination, which have a decided influence on the flow of the tide at Mare Island because of the pe- [273] culiar strong westerly trade wind that blows during the summer months—that is a big factor.

(Testimony of Carl A. Carlson.)

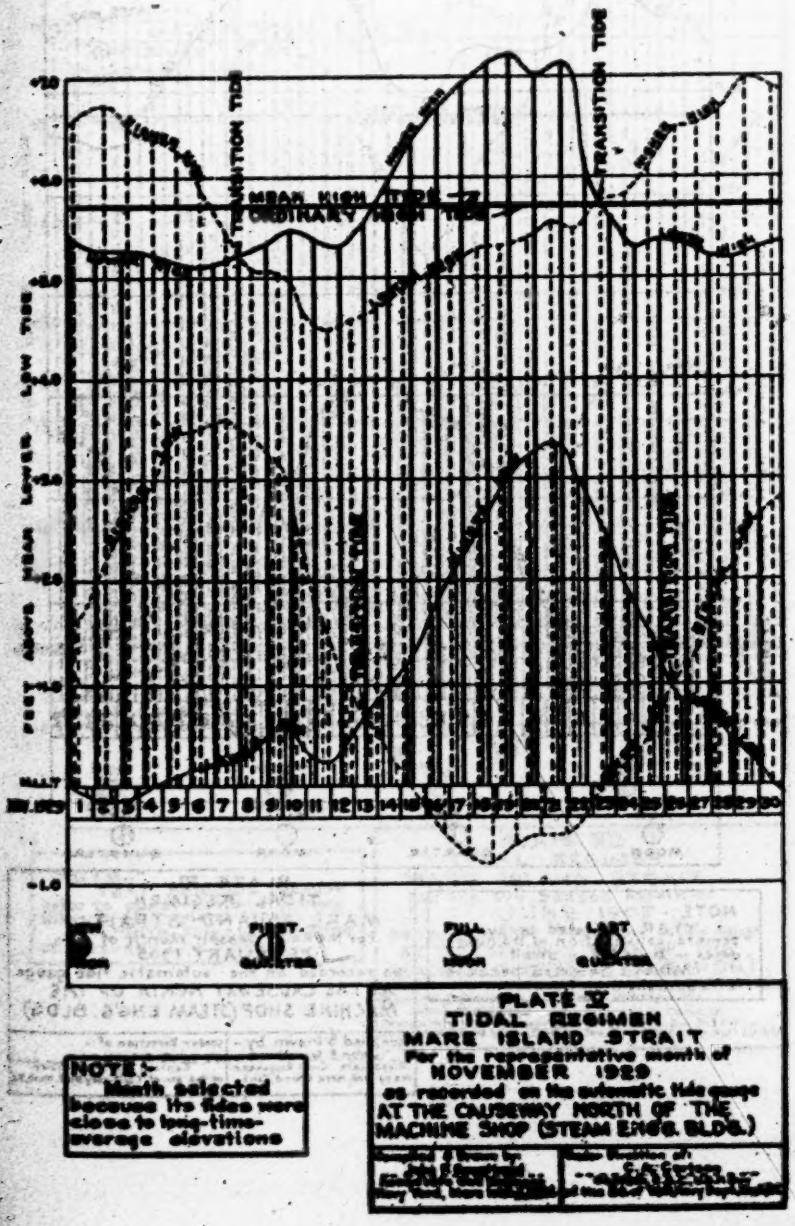
The mean high tide at Mare Island is a mathematically-determined line, which is averaged from all observations over a number of years and at Mare Island we have twenty-five years' observation. The longer the period, the better the plane of mean high water, but for ordinary purposes one month would be a minimum for a rough approximation. From my study of the tides and tidal records, it is not possible to say what is the mean high tide at Mare Island by visual observation of the flowage.

(The tidal plates were received in evidence as "Plaintiff's Exhibit MM".)

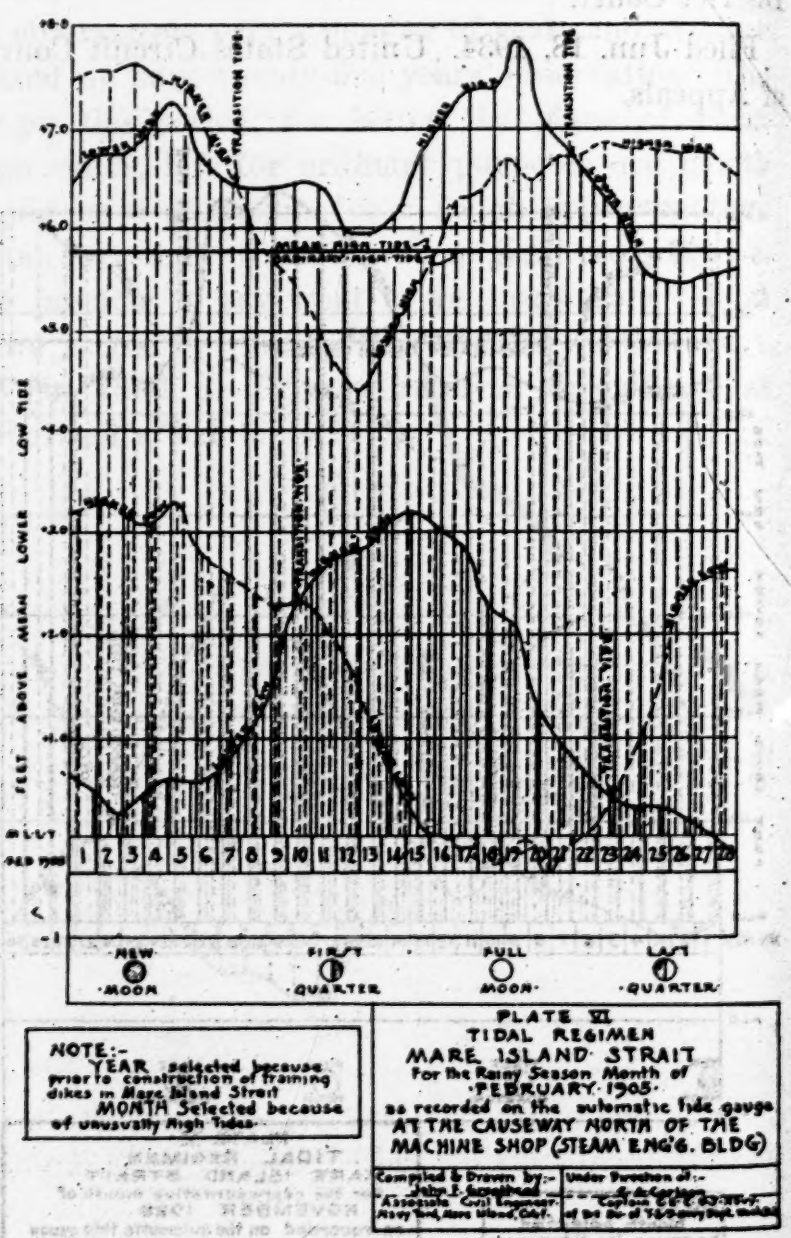
PLAINTIFF'S EXHIBIT MM

[Endorsed]: Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.



Page 2 of Plaintiff's Exhibit MM



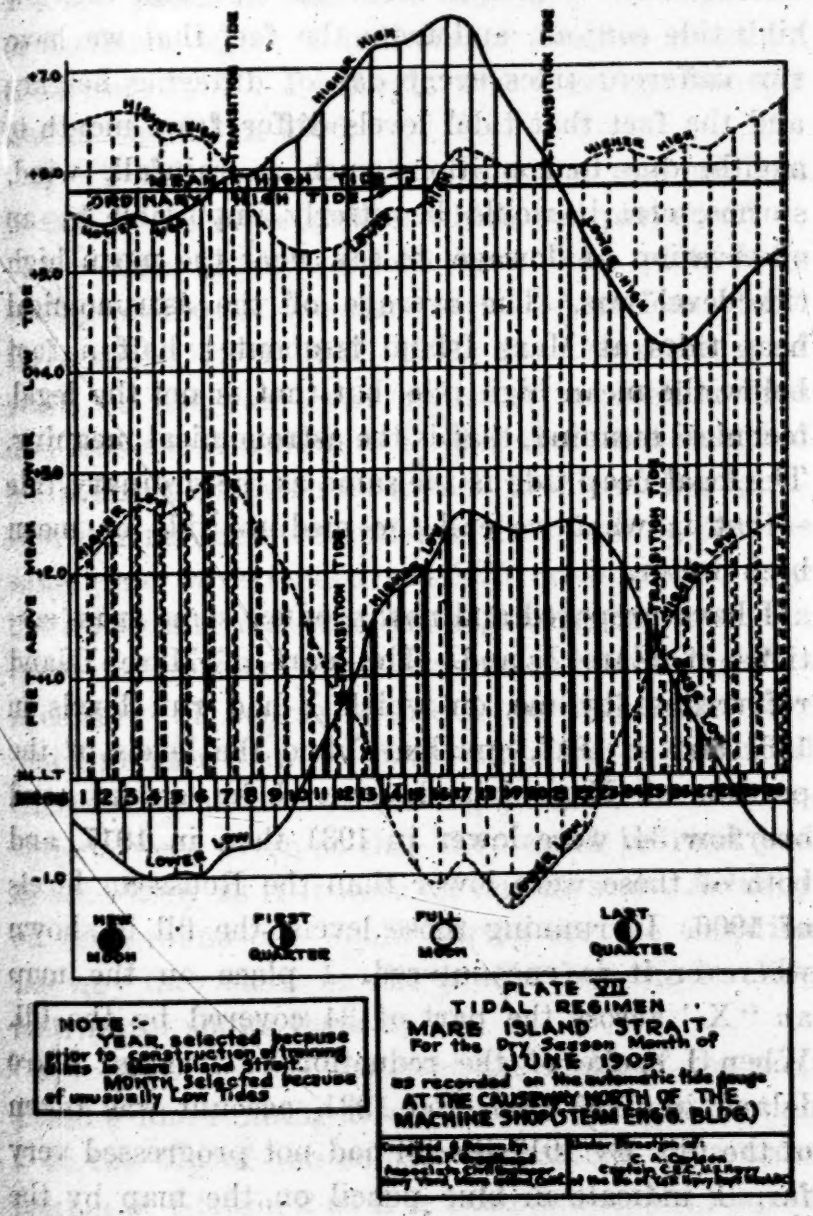
NOTE:-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually high tides

PLATE XI
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Rainy Season Month of
FEBRUARY 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENG'G. BLDG)

Compiled & Drawn by:- Philip T. Farquhar, Associate Civil Engineer, Navy Yard, Mare Island, Cal.

Under Direction of:- [illegible] Captain U.S.N. [illegible]

Page 3 of Plaintiff's Exhibit MM



NOTE :-
YEAR selected because prior to construction of training dikes in Mare Island Strait.
MONTH Selected because of unusually Low tides

PLATE XII
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Dry Season Month of
JUNE 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENGR. BLDG.)

Compiled & Drawn by
[illegible]

Under Direction of
C. A. Carlson
Captain C.E., U.S.A.

(Testimony of Carl A. Carlson.)

WITNESS continuing: From the fact that only on two days a month the high tide and the low high tide conjoin, and from the fact that we have two different tides every day of differing heights, and the fact that tidal levels differ from month to month, due to conditions such as rainfall, wind, storms, etc., it would be utterly impossible by an observation of flowage, to say what the mean high tide level was. The average of the astronomical neap tides at Mare Island is about a half a foot below the mean high tide, but that is not the legal, technical meaning, that is the astronomical meaning. The legal neap tide is the same as the ordinary tide —that is what we call the medium tide or mean high water.

I have prepared and now produce some cross sections of Mare Island. The part of Mare Island referred to by me, on which I had run levels in 1931 and in 1917, and had found the levels of the portion of Mare Island covered by swamp and overflow 34, were lower in 1931 than in 1917, and both of those were lower than the Rousseau levels of 1906. In running those levels, the fill is shown wherever it is encountered. I place on the map an "X" across the part of 34 covered by the fill. When I spoke of the reduction of level of Mare Island in 1906, 1917, and 1931, account was taken of the fill. By 1917 the fill had not progressed very far. I indicate in blue pencil on the map by the letter "Y" the line to which [274] the fill had progressed to 1917. The line "XX" is the progress

(Testimony of Carl A. Carlson.)

of the fill to 1931. By 1906 the fill only extended to a small patch in the area adjoining the highland or fastland, which I indicate on the big chart by the letters "ZZ". I indicate with a broken line the line of the fill in 1906.

Q: I will show you this document and ask you if that is the cross section which you prepared?

A: These cross sections have been plotted by taking profiles at the same series of stations of the three maps, 1906, 1917, 1931; for the purpose of 1913, we just ran levels across at the section lines and took the elevation of the levels so that we could get a direct comparison at each profile of the variation during these several periods of years. At the same time we extended the 1931 cross section over the levees and out onto the adjoining flat land. In order to represent the elevation on a drawing it is necessary of course to use a vertical scale very much greater than the horizontal; that is the usual engineering method of making profiles, but the elevations were given so that they could be read just as accurately as if it were all on one scale. Actually on the ground one would hardly see the elevation the way they show on the profile, but the leveling instrument shows them up.

Q: Now, on the insert at the right of the map I find a line running across Section 2. Does Section 2 at the top of the column correspond to a cross section of Station 2 as it is exhibited on the map in evidence? A: Yes.

Q: Station 6 plus 20 corresponds to the cross

(Testimony of Carl A. Carlson.)

Q: Those stations, as I understand, are 100 feet apart? A: The interval is expressed in hundreds and parts of hundreds. They had to be irregular in order to miss firing points. You see, this ground is used for a rifle range, and in order to get levels that were undisturbed, we selected sections so we would miss an ob- [275] vious artificial structure, like a firing point.

Q: Then Station 2 represents a cross section of the Island 200 feet south of the north boundary of 34; Is that correct? A: Approximately. Actually, it is 200 feet south of Station O, which is the Joy monument. Q: The Joy monument, which is on the north line of 34? A: On the north line of 34.

Q. By the way, the north line of 34 represents the south line of the land that was awarded by the Irwin Case to the San Francisco Savings Union, isn't that so?

A. Yes, as established by the Joy survey.

Q. As established by the Joy survey? A. Yes.

Q. Station 6 plus 20, therefore, is a station 620 feet south of the Joy monument, which is Station O? A. Yes.

Q. Station 10 plus 40 is a station 1040 feet south of the Joy monument? A. Yes.

Q. Station 13 is a station 1300 feet south of the Joy monument? A. Yes.

Q. And Station 19 is a station 1900 feet south of the Joy monument? A. Yes.

Q. Station 21 plus 50 is a station 2150 feet south of the Joy monument? A. Yes.

(Testimony of Carl A. Carlson.)

Q. Station 24 is a station 2400 feet south of the Joy monument? A. Yes.

Q. Station 34 is a station 3400 feet south of the Joy monument? A. Yes.

Q. Station 48 is a station 4800 feet south of the Joy monument? A. Yes.

And Station 60 is a station 6000 feet south of the Joy monument? A. Yes.

Q. And corresponds to the south line of 34? A. Roughly.

Q. Roughly, of course. A. Roughly.

Q. Now, have you plotted on this cross section the levels of 1906? A. Yes. [276]

Q. 1917? A. Yes.

Q. And 1931? A. 1931 as far as there is no filling in.

Q. As far as theer is no filling in? A. Yes.

Q. What is this at the bottom of the enlarged section?

A. It is Station 2—on account of the small scale of this drawing I just had that enlarged without changing the scale or enlarging the whole dimensions, so as to develop the sand ridge more closely. It shows very distinctly. For instance, the difference between the 1906 line, 1917, and 1931 shows a remarkably zig-zag cross section, because recently, that is, within a year or two, they have taken out sand there and I walked across the ground and noticed the depression made where the sand has been dug out. For that reason I particularly took a section through that.

(Testimony of Carl A. Carlson.)

Q. Then that jagging in the line of 1931 represents the bottom of what you called yesterday the borrow pit? A. Yes.

Q. Where they borrowed sand from? A. Yes.

Q. Now on this cross section you have indicated mean high water. A. Yes.

Q. And the line of the mean high tide?

A. Yes, as now used, 5.8 above.

Q. That is .2 of an inch higher than the original mean high tide before the work of man changed it. Is that correct?

A. Not definitely; we cannot exactly tell. We know that there is a progressive change there, but how much we cannot tell. For instance, in 1925, when I was stationed at Mare Island, I used 105.60 as mean high water.

Q. That would be 5.6 above the datum plane of lowest low water?

A. Yes, and the Coast Survey monument translated into our datum plane would be about 5.8 feet, anywhere from 5.5 to 5.8 would be a fair indication of the probable change in a period of years.

Q. Now, directing your attention to the explanatory notes of this cross section I find "1931 cross sections, from a recent survey showing elevation of land. Note sunken condition of the area be- [277] tween levees as compared to the normal height of accretions on the east and west sides." What does that refer to?

A. This light dotted line is the present elevation of the land outside of the levee which on the San

(Testimony of Carl A. Carlson.)

Pablo Bay side is up higher than mean high tide than it is on the Napa River side.

Q. The broken line, then, above the line of mean high tide represents the level of the present accretions outside of the levees? A. In 1931?

Q. In 1931. A. Yes.

Q. And is the height of the levees indicated by this broken dotted line? A. Yes.

Q. That is also true on the Napa Creek side? A. Yes.

Q. And the broken line has indentations downward on the Napa Strait side; what is the significance of that? A. That is a section cut through the regular drainage sloughs on the island that drain to the Napa River side.

Q. Those are a representation of the bottoms of those sloughs? A. Yes.

Q. "Traces still remain of the original sand ridge or barrier on the San Pablo Bay side. The irregular profile of Station 2 shows the disturbed condition of the surface due to recent excavation of sand at that point." I believe you have explained that as being the bottom of the borrow pit?

A. Yes, I have.

Q. "Area south of Station 24 has been used for deposit of spoil from channel dredging. A cross section at Station 48 is representative for all of the sections in this area. Note that fill covers largely original tide lands." Now, what is the reference there? Will you explain from the map what you mean?

(Testimony of Carl A. Carlson.)

A. From the plane of mean high water to the plane of low water is the shore of our original tide land as it existed at the time the property was acquired; that is determined by the fact that the early surveys of the officers connected with the Coast Survey, who made the first hydrographic surveys of Mare Island, definitely established the location of the line between mean high water on both sides of the island. [278]

Q. "Station 48 shows an abnormal elevation due to artificial fill." What is the line of the artificial fill? Can you point out that line to us?

A. Yes. The line of 1917 in that case is above the line of 1906, and there is a considerable fill outboard on the Napa River side from the original tide line.

Q. "1906 cross sections—from a former survey, as shown on P. W. Map R. 188 (C-188) of February, 1906." That is the map that has been introduced, that has been identified as Defendant's Exhibit No. 4? A. Yes.

Q. I believe you said that was a sister map to Defendant's Exhibit for identification No. 7?

A. Yes.

Q. A companion map? A. Yes.

Q. "Plotted within the limits of the original shore line of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1921." Will you illustrate that?

A. Examining these sections, you will notice progressive losses in elevation between 1906 and 1917 and 1931; in some places there is a little varia-

(Testimony of Carl A. Carlson.)

tion due to the disturbance of filling the rifle range and other artificial works, but it shows up very clearly and conclusively the deterioration that has taken place within the original limits of mean high water.

Q. "1852 cross sections. These have been plotted as follows: (a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1856 U. S. C. & G. S. chart, and from the replotting of the original notes (Exhibits L-20 and L-21)." Is that the source of your material for that line? A. Yes.

Q. Those were the surveys of the Coast and Geodetic Survey?

A. Bache survey at Mare Island.

Q. "The locations of sloughs, ponds, and drainage features are taken from the 1851-8 surveys of U. S. C. & G. S."

A. There is a series of surveys in evidence of that character.

Q. "The 1906 cross sections, although lower in elevation, were [279] found to retain corresponding locations of sloughs, ponds and drainage features." Is that correct? A. Yes.

Q. "Therefore the 1852 profile has been drawn parallel to the 1906 profile." A. Yes.

Q. The reason for it being that they correspond to the elevations of 1906? A. Very well.

Q. To what height does the land outside of the levee build up at present?

A. It builds up on the Napa River side about two-thirds of a foot, and on the San Pablo Bay to

(Testimony of Carl A. Carlson.)

about 1.4 feet. It might be better expressed on the river side as .67 of a foot, and on the San Pablo side 1.4 feet.

Q. Do you happen to know whether that .67 is the same height to which the tule was built up as shown on the Sloat Board report?

Mr. KELBY: I object to that as calling for the conclusion of this witness.

The COURT: Overruled and an exception. Your Sloat Board report states what?

Mr. PECKHAM: It states .67 feet also.

The COURT: Let the witness answer.

A. The Sloat Board states that the area roughly here of tule land—

Mr. PECKHAM: Q. What are you indicating on the map? A. This area.

The COURT: You say "roughly in here."

A. An area about like that.

Q. How would you get that in the record?

Mr. PECKHAM: Q. Will you indicate the line with a blue pencil please, and mark it "AA," and line of the Sloat Board?

Mr. KELBY: We object to any reference to the Sloat Board chart or map, because it has not been produced or identified here.

Mr. PECKHAM: Counsel is in error on that.

A. This is roughly—

Mr. PECKHAM: Just a minute, resume the stand, please, Captain Carlson. [280]

Q: Directing your attention now to Plan No. 7 annexed to the Sloat Board report, Government's Exhibit G, state it?

(Testimony of Carl A. Carlson.)

A: This area marked "Tule Land" is described by the board as lying generally at an elevation of .67 of a foot above the plane of mean high water.

The COURT: Q: Is that the land you were marking or designating on the large map?

A: Roughly, it is.

Q: Now, going back to the explanatory notes, "The area east of the Sand Ridge or Barrier has been averaged in the 1852 cross sections, at an elevation of .67 of a foot above mean or ordinary high water, and represents the lowest possible elevation of the low and tule land east of the barrier or ridge." What is your authority for that statement?

A: In view of the statement that in the protected region on the east side the board found no elevation of .67 of a foot, it is a very fair conclusion that the land on the other side was at least that high, if not more than that, due to the action of the water, the function that the island performs as a dividing wall between San Pablo Bay and Napa River, and also, it must be remembered that the accretions now are more recent, that is, of shorter life period, and therefore they have not had time to build up much as the original ground must have built up when it had been undisturbed there for centuries; man had not disturbed it, and there had been no hydraulic mining started in California, and no agriculture, so to speak, and the waters of Mare Island Strait and Napa River were perfectly clear, and the deposit on the beach was of sand instead of silt that comes in now.

(Testimony of Carl A. Carlson.)

Q: Under the reference "d" you have "A minimum elevation for the crest of the sand ridge has been derived from the least disturbed cross section shown on the earliest contour survey (February 1906), Defendant's Exhibit No. 4 for identification. The use of this elevation on all cross sections restores the original elevation of the sand ridge to the shore line at mean high water."

The COURT: Q: Due to the flow of the river from the Sacra- [281] mento Valley, is this silt still coming down?

A: It came down very heavily, of course, during the days of hydraulic mining, but the buoyant stuff went down San Pablo Bay. Along about 1912, or 1910, I would say, the Government built these wooden dykes out into the river to concentrate the flow of the current, that naturally caused a more rapid filling in of the original tide land.

Q: You say the river, You mean Napa river?

A: Yes. Of course, the San Pablo Bay side builds due to artificial accretions caused by Dyke No. 10, which the Government built and ran away out into San Pablo Bay, and that naturally attracts the sediment, and that is the reason that has built out so rapidly. That was the purpose of the longitudinal dyke, to trap that material.

Mr. PECKHAM: Q. I observe from the cross section 2150 feet south of Station 0, 2400 feet of Station 0, 3400 feet south of station 0, that the land now appears to be lower than the line of mean high water. A. Yes.

(Testimony of Carl A. Carlson.)

Q. To what do you attribute that fact?

A. The combination of the sediment due to the land being dyked off and also to certain loss by erosion, artificial works of man, plowing, and all operations tend to deteriorate the surface, and it is not being restored by the process of nature, which is the process by which salt marsh and swamp are built.

Q. Do your surveys and levels on those particular stations show a progressive deterioration from 1906 to 1931?

A. Very fairly, as near as such levels can do.

Q. From that can the annual rate of deterioration be determined?

A. We made a conservative estimate, and having fixed by the original surveys the original position of this land with respect to the plane of mean high water, it is fair to project that section up to its original position, and to carry the profile of the land as it now exists, making some slight allowance for the taking off of sand on the ridge; for that reason we projected the sand ridge across one of the ridges that is least disturbed, which has not been dug [282] down; of course, the 1906 Rousseau map shows these ridges in the best manner. But we have a more positive check on that, due to the natural formation of the San Pablo Bay shore. This is a complete shore; that is, it has to take the wave action and tidal action of the entire San Pablo Bay; the waves have to break against and on a beach, and that sand will go above the spring high tide, blow up and build dunes, what is known as barrier

(Testimony of Carl A. Carlson.)

ridges and dunes; that is a marked characteristic of lowlands lying the way the west shore of Mare Island does, because it is the strong prevailing wind which has a current clock-wise that brings the material on the beach, and the storm and wave action causes that to build up ridges. That is very well substantiated on the early surveys of the island made by the Coast Survey, because you will notice before the taking of their mean high water line there is a series of objects looking like tiny piles that form in between two separate barriers or ridges. The way these beaches build up, a ridge starts and then another one starts, and D. W. Johnson and Gilbert, and all the authorities on seacoast marsh formation, describe very fully this sort of beaches. The condition on the river side is different. It does not have the wave action. It is a different condition, and for that reason the barrier ridge, the sand ridge, serves as a berm or backbone, which makes it possible to build against it and accumulate material, and it is well shown by the fact that the drainage is toward the Napa River side, showing that this backbone along here is higher and causes the water to shed to the Napa River side.

Q. These lines that are indicated on this cross section are the lines exclusive of the line of the fill; Is that correct?

A. No, at Station 48, for instance, wherever the 31 section is here, it is actual present surface. Of course, it is impossible to plot in between that, because we have no data.

(Testimony of Carl A. Carlson.)

Q. As to Station 48 and 60, south of Station 0, the 31 line does indicate the amount of the fill; Is that correct?

A. It shows the amount of fill at that time. This fill, of course, is a pro- [283] gressive proposition. It is a gradual proposition. The dredging is conducted for the purpose of keeping the channel clear. We have to have wastage area for that material, otherwise we would have to haul it out to sea, so that we pump it into these basins and let it settle from one to the other. The ideal way is just to pump in a little and let it drain out and dry and settle, and in that way we get a more compact fill. If you put it all in at once it would stay a long time.

Q. Of the dredged material taken from Mare Island Straits, what proportion of it went on the original Mare Island between the original neck of the peninsula beyond 34 between the mean high tide line established by the Coast & Geodetic Survey in 1852 and the first little recorded fills?

A. The one I have shown on XX.

Q. Is that XX, or ZZ? Is that the one you refer to?

A. Yes, ZZ. It is approximately like that. Later operations extended over Station 48; that has been a progressive, gradual proposition, but of course the larger part of this fill is over the original tide land; that makes a basin to put it, and the area of the tide land outside of the line of mean high water is a larger area for all cases except that little one shown on the map of 1899.

(Testimony of Carl A. Carlson.)

Q. Directing your attention to the plan No. 7 of the Sloat Board, has any of that dredged material been put on the tule land indicated as east of Mare Island?

A. Yes, this land has all been leveed, dyked off, and filled up to, well, almost up to a yard grade all through.

Q. What do you mean by "yard grade", a yard of three feet?

A. The Navy Yard grade along the sea wall is about 110½, that is 10½ above datum or 5 feet above mean high water, in round numbers. Then we generally slope it back to the middle of the yard, where it will be 116, 115—that is about 10 feet above mean high water, so as to give drainage and sewage, etc. I can say that that land probably is above 108, that is three feet above mean high water. [284]

Q. Directing your attention to Plan No. 7 of the Sloat Board report, Government's Exhibit G, I call your attention to a line that appears on that. Have you seen the original of which this map is a photostat?

A. I have seen one of the originals—that is, this photostat is from one of the original paper drawings of the Sloat Board.

Q. I direct your attention to a little curved or meandering line at the lower left-hand end of the map.

A. That is a very light pencil line on the original drawing. Of course, the photostat brings it out, but on the drawing it is a very light pencil line, which cuts across the water line.

(Testimony of Carl A. Carlson.)

Q. Will you indicate with a blue pencil and XX the pencil line that you refer to? A. Yes.

Q. That line, you say, appears as a pencil line on the original?

A. A very faint pencil line. The drawing is in ink.

Q. The drawing itself, is in ink. A. Yes.

Q. Do you know what the practice of draftsmen is with respect to platting a map in pencil, either before or after inking it in?

A. Well, it is undoubtedly all plotted in pencil first.

The COURT: Q. What is the significance of that pencil line?

Mr. PECKHAM: What is the significance of that pencil line?

A. I don't know, it does not mean anything? It cuts across the hatching.

Q. It actually cuts across the hatching?

A. Yes. It does not mean anything. Anybody could put that pencil line on in talking about it. It has no significance, but showing up in the photostat in accentuated form it might be misleading.

Q. Directing your attention to this plan No. 7, I notice a lot of land marked with lines and cross hatching different from the cross hatching of the lines of the land on the east side of Mare Island, and the land on the neck of the island.

A. Yes. This lighter indicates grasses, such as on tilled land, and distinguished from salt marsh or low land. In other words, this would be land on

(Testimony of Carl A. Carlson.)

the table [285] land; that is, this land is either 20 or 25 feet above mean high water.

Q. I call your attention to a very heavy line on the west side of Mare Island, adjoining that land that you have described as grassy land, and ask you what that indicates.

A. That indicates a decided break in the table land; that is, the bluff breaks off sharply. Then that shows the water line, the bottom, and there the two practically coincide.

Q. In your opinion, does that represent bluff?

A. The bluff.

Q. Will you mark that with "YY", where it begins and where it ends? A. Yes.

Q. The line from YY represents, in your opinion, bluff? A. Yes.

Q. I will call your attention to a plan No. 8 of the Sloat Board Survey, and ask you what relation that bears, if any, to Plan No. 7?

A. This outline of the high land or table land very closely corresponds to this, and in making a drawing of the same scale you get the same—this is merely an enlargement of that outline of the shore. It is not developed here because this is only a plan for the Navy Yard, and the other just indicates part of it.

Q. I direct your attention to a meander line from the east shore of Mare Island, running around to the outside limits on the right of the map, and ask you if that corresponds to any line on Plan No. 7?

A. It very closely does. For instance, you can see this little jog in the line, it is duplicated right here.

(Testimony of Carl A. Carlson.)

Q. Then, in your opinion, the line that I have just indicated—and will you mark that line ZZ, at the beginning, to the outer limits of the map?

A. Yes.

Q. Now, will you mark to the line ZZ what that corresponds to on the plan No. 7? Some place down here.

Q. Now, does this plan No. 8 show the contours of Mare Island?

A. No. This is not a contour plan, but it could be used for drawing in the contours over the area that the board studied for a ship [286] lay-out, building lay-out, because you will notice it is subdivided into rectangular lines 50 feet apart, showing that they ran a line through there and took the levels all along it, and then took levels at right angles at certain places to make it possible to estimate the topography, and to estimate the proper location of buildings, and naturally how much earthwork and space would be required to locate the buildings.

Q. Directing your attention to the line ZZ, can you tell from these rectangular squares the levels that it crosses?

A. The levels running out to the ZZ line, there is one four feet, 4.2, here is one 3.6 near it.

Q. Is there any interpretation of those levels on that map?

A. Yes, the level indicated is above mean high tide.

Q. Mean high tide is shown on this map at what?

(Testimony of Carl A. Carlson.)

A. 7½ feet. But remember that is not the same datum plane as we now use. That is not 7½ feet above our plane. It is a datum that they established. We could not relocate that, but we could take an average of all the tides a month and find the plane of mean high water of all tides, both high and low, and in that way compare them. Theoretically, the average of all those planes should not vary except due to the changed conditions in the bay.

Q. These levels that this line crosses, you have said—

A. (Interrupted) These levels are inboard of the line. If you go outboard of the line you will drop down to—there is 1.67, here is 1.67. In here there was a little tidal lagoon. Up in that place is indicated a little low spot; in other words, they run a line around it and they got an elevation there, and it looks like .67—two of them .67 cross that line.

Q. Mark that or indicate that with a letter—use an "X" on that. A. Yes.

Q. On Plan 7 will you indicate the extended tidal lagoon?

A. Yes. Drainage also goes into that. There is an elevation. There is an- [287] other point .67 outboard of the same line up here.

Q. Does that line cut across any elevation higher than .67?

A. This line is not a contour line; apparently it is a line of the edge of the table land that had a varying height. For instance, over here I find one right close to the line reading about four feet.

(Testimony of Carl A. Carlson.)

Q. 4 feet above mean high tide?

A. Yes, all of these elevations speak about mean high water.

Q. The map says "The levels indicate the elevations of mean high tide."

A. Yes. Those elevations across here, you will notice here by the bluff show an elevation around 20 or 25 feet, right across; this land with the stippling indicates that is grassy high land.

Q. Can that line ZZ represent the line of ordinary high tide?

A. Oh, no, not at all.

Q. Can you state whether that line is the source of the line called line of high water or line of upland in the two maps you looked at yesterday?

A. Yes, it is. It corresponds as close as lines could to that.

Mr. KELBY: Q. The tidal lagoons to which you have referred, are they within the area or the boundaries of 34?

A. No. I was speaking about one down in here, a sort of side-hill drainage, as well as running into the salt marsh, there.

Mr. PECKHAM: Q. Do you find anything on Plan No. 7 that indicates that the line that you there marked as ZZ—just forget about this map for the present, please, Captain—the line that you marked ZZ on plan No. 7 and on plan No. 8, do you find anything on those maps to indicate that the line at the left or north end of the plans indicates anything else? A. No.

Q. Anything different? A. No.

(Testimony of Carl A. Carlson.)

Q. In your opinion, do those two lines indicate the same thing?

A. Yes. That whole shading is most positive and clear. That is a [288] very usual system of making topographical maps in those days. Instead of running contours they used a system of shading. That shading is done very carefully to indicate the degree of slope. For instance, this very close shading is run in on contours.

Q. I am going to ask you to mark this line that I point out to you now as AA on plan No. 7 of Exhibit G. A. Yes.

Q. Do you find anything on plan No. 7 of Government's Exhibit G that shows that the line that you have marked ZZ is intended to indicate anything different in character from the line marked AA?

A. No.

Q. Do you find anything on plan No. 7 that indicates that the line you have just marked AA is anything else than a division line between the table land and the salt marsh?

A. That is all, it is a dividing line.

Mr. KELBY: Q. In making that answer, did you have in mind the report which accompanied these plans? A. Yes.

Mr. PECKHAM: Q. Directing your attention again to the Sloat Board report, I call your attention to the front page of that report, page No. 1, where they refer to "No. 2, Ringgold's Chart No. 1, being a chart of the Bay of San Francisco." Have you ever seen that chart?

(Testimony of Carl A. Carlson.)

A. Yes, I have a photostatic copy of it.

Q. "No. 3, Ringgold's Chart No. 2, being a chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco." Have you ever see that map? A. Yes.

Q. I call your attention to "No. 6, Ringgold's Chart No. 3, being a chart of Suisum and Vallejo Bays." Have you got those charts?

A. I did not bother to bring the Suisun Bay chart, because that is outside of the Gulf of Benicia —it is outside of Carquinez Straits. It does not show anything of Mare Island or of San Pablo Bay.

Q. May I show you Government's Exhibit L-11, and ask you if that is the chart that is therein referred to?

A. Yes, that is the [289] chart.

Q. That is what chart, referring to the Sloat Board Report?

A. That is the chart designated No. 3, Ringgold's Chart No. 2, being a chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco.

Q. Now, directing your attention to Government's Exhibit L-13, have you ever seen that chart before?

A. Yes, that is one of the charts that belonged with the Ringgold Charts. The reference number is No. 2, Ringgold's Chart No. 1, being a chart of the Bay of San Francisco.

Q. Now, I will show you Government's Exhibit L-12, and ask you if you find that exhibit referred to in the Sloat Board Report?

(Testimony of Carl A. Carlson.)

Mr. KELBY: Of course, the report speaks for itself.

A. No. 6, Ringgold's Chart No. 3, being a chart of Suisun and Vallejo Bays. I have examined the entire set of charts published by Ringgold. There is a complete set of charts in the Library of Congress, and I have also had some photographs of the published charts.

Mr. PECKHAM: May we have this cross section introduced as Government's Exhibit next in order?

Mr. KELBY: We object to the introduction of this cross section as incompetent.

The COURT: Overruled; an exception.

(The document was received in evidence as "Plaintiff's Exhibit NN".)

PAGES - 829

AND 830 ARE

MISSING

(Testimony of Carl A. Carlson.)

Mr. PECKHAM: Captain Carlson, in all of your studies of Mare Island Navy Yard and all your experience with the soil and the terrain of Mare Island Navy Yard, have you ever found any indication or evidence of a natural water course traversing Mare Island from San Pablo Bay to Mare Island Straits?

Mr. KELBY: I object to that as absolutely incompetent, no proper or any foundation laid. [290]

The COURT: Overruled, an exception.

WITNESS continuing: I have made a very careful study of all the original surveys and many subsequent maps and studies and there is no indication of any permanent water-way. One of the charts indicates a little drainage, such as would occur after a storm breaking through the barrier or berm, but nature objects to any water course and keeps building up the beach.

Mr. KELBY: I move that the answer of the witness be stricken out on the ground that it is incompetent, and on the further ground that it constitutes an attempt to dispute the findings and conclusions of United States Surveyor General Wagner, in respect to the land in controversy, and that it was his duty to determine whether or not this island was separated from Mare Island.

The COURT: Denied, an exception.

WITNESS continuing: The relief map was constructed under my direction to give a better visual idea of the whole situation. I have had this relief map made from the Coast & Geodetic Survey of 1884, which, in turn, is compiled upon the early

(Testimony of Carl A. Carlson.)

topography surveys in 1851, 1856 and 1858, that is, so far as the fore shore is concerned, the land between the low water and the line of ordinary high water, or what engineers term "mean high water". Then the topography of this part, of course, on a model like this, it becomes very exaggerated, so we just use a logarithmic scale. Actually, this land is very high and, of course, of no value. These little bumps are exaggerated in order to give a vertical scale; in other words, this vertical scale had to be plotted so as to make the thing visible. That is the practice in making models. So this particularly brings out the location of the fore shore, the area reached by the daily tides between low water and the line of mean high water. That forms the physical side walls of the island; in other words, physically we go down to low water line to find out what the island is as a mass, and we find here from the hydrographic surveys sound- [291] ings had been carefully taken and plotted, so we are able to determine the position of the fore shore with the greatest of accuracy. That is the most accurate determination that is made. No other type of surveys except the hydrographic surveys will develop the fore shore. We use the same system of taking soundings in our dredging work to determine the actual inside slope under water of this topography. That same method of soundings over here determines the location of the fore shore. Then we find a remarkable uniformity in this San Pablo sandy shore. The material is carried along by the current and piled up against it and forms a sandy beach. The tide goes out, the

(Testimony of Carl A. Carlson.)

sand dries, the prevailing afternoon wind begins to blow it up, making dunes, the wave action keeps piling it up, and we get one or more ridges or berms. I have not attempted to make a detailed representation; it would be too complicated. This just gives a general idea. For instance, up here there is indicated in blue what is known as Long Pond. From the map that Long Pond indicates a depression between, say, two ridges, one an older ridge, because this sort of shore builds up gradually. It is trying to do that same thing today with this silt, but the silt is such poor, light material it does not build as well as sand. Then it shows a decided drainage toward Napa Creek. If this land were not high enough to withstand the action of the waves against it, it would be all swept away, there would be no vegetation; all you would have would be a reef. This is a powerful body of water coming down here, and if it came across this beach it would do so; in fact, the Government has several times figured on trying to cut through here, but if they cut a 10-foot channel through here it would cost too much money; you would have to build a restraining wall away out here to keep this little current and drift from filling it in. Otherwise, it would choke right up.

WITNESS continuing: The source of the material for this map was the Hilgard 1884 chart, which is a composite of the early sur- [292] veys. Some of these are rough sheets, fragmentary.

Defendants' Exhibit for identification "10" is without doubt a blue print of the same map and has very complete soundings through Napa Creek and

(Testimony of Carl A. Carlson.)

off the San Pablo Bay Shore. It also shows a very flat area because it takes so much to drain it and, of course, the sloughs get large at the mouth and then they diminish rapidly. Along here you can see the little parallel ponds. Here is the long pond showing very well the characteristic formation of the beach fronting a marsh. Here is another one. Here, and here is one in here, with a little island shown there.

Mr. PECKHAM: We offer the relief map and the Hilgard map as exhibits for the Government next in order.

Mr. KELBY: Let me make an inquiry with respect to the witness' qualifications, if I may, with the consent of the Court.

The COURT: Go ahead.

WITNESS continuing: I selected the map known as the "Hilgard Map" because we considered it had on it all of the features that could be reproduced on a single model. By "we", I refer to Mr. Greathead, who was my assistant at that time, in immediate charge of making the model.

Q. So it was merely your opinion and that of your assistant at that time that this was representative of all of the maps showing it, prior maps?

WITNESS continuing: We did not got at it from that point. We considered this a suitable map to use for making the model to develop this drainage system which has been shown on other maps. The map marked "Defendants' Exhibit 10 for identification" is based upon an actual survey. The survey was not made by Mr. Hilgard. He was the superintendent, the director in Washington. He did not make any

(Testimony of Carl A. Carlson.)

surveys. The surveys were made by the original officers, like Cutts.

Q. So that it is a compilation that is based on prior maps? [293]

A. All maps are until you get the original, which we have already in evidence. The relief map here is an expression of my own opinion, that is, a professional opinion based upon a great deal of study of early records wherever found, the testimony of people who lived on the island in the early days. These records re- [294] cords regarding it all confirm and check with the observed characteristics of marsh land portrayed on it.

Q. So that this relief map is not only expressive of your own views, your inferences from maps that you have examined, but also of statements and declarations made by those who were alleged to have been familiar with the island in early days?

A. It checks, you might say.

Q. And from data on file in your office?

A. Collectively, but the basic data for the sand ridge and all of that, we have, for instance, in the Rousseau Map.

Q. These green spots indicate vegetation?

A. Yes. Of course, you understand that in pools like this the tide will back up and it will leave bare spots with a sort of red weed in it. Where there are tules along here, and along here on the Napa River side, you will find more of the salt marsh grass growing on the San Pablo Bay side. For instance, I was out there last fall and right along here picked up samphiers still growing on 34.

(Testimony of Carl A. Carlson.)

(The relief map was received in evidence as "Plaintiff's Exhibit OO".)

(The Hilgard Map was received in evidence as "Plaintiff's Exhibit PP".)

Mr. KELBY: To the introduction of it we object on the ground that it is incompetent, no proper foundation laid, no opportunity for the defendant to examine any of the data upon which it is based, and which entered into its composition.

The COURT: I understand it is all in evidence, is it not? A. Yes.

Q. All of the data is in evidence?

A. Substantially, yes.

Mr. KELBY: The declarations of these persons, I understand are not in evidence.

The COURT: I understand that the declarations of these persons that were mentioned were simply for the purpose of checking up, isn't that so?

A. For checking our study. [295]

The COURT: Overruled; an exception.

Mr. PECKHAM: If your Honor please, at this time, for the convenience of the Court, I would like to offer as companion exhibits to the relief map two photographs of the relief map, one of the map as it is, and one with Swamp and Overflow 34 imposed upon it.

Mr. KELBY: We do not object to that because of any infirmity which inheres in it, but we do make the objection that it is incompetent, and immaterial.

The COURT: Overruled; exception.

(The photographs were marked as part of "U. S. Exhibit 00".)

WITNESS continuing: The north line of 34 on the relief map corresponds to the Navy Yard fence

(Testimony of Carl A. Carlson.)

at the present time and everything north of that was land that is covered by the case of San Francisco Savings Union vs. Irwin. Where that fence comes across, you can go out there and by taking samples of the sand—I have observed it—I have not been out there recently, but I have an airplane map that I saw yesterday showing that very clearly. You can also take samples of the sand here, the same as we have taken samples here, but I have not personally done it this year.

Q. Were you out there in July of last year.

A. Yes.

Q. At that time did you actually see that sand barrier? A. Yes.

Q. About how high was it above the level of the rest of the ground at that point?

A. About waist high when you stand in back of it.

Mr. PECKHAM: Q. Now, Captain Carlson, does swamp and overflow 34 fall within the lines of the Freeman survey? A. Yes.

Mr. PECKHAM: We offer in evidence from the records of the Navy Yard the letter of John Rodgers, Rear Admiral and Commandant, dated February 4, 1873, to Robert Gardner, Esq., Register, State Land Office, Sacramento, California, also letter from the Surveyor General of the State of California, Robert Gardner, to Admiral [296] Rodgers, U. S. Navy, dated November 25, 1873.

Mr. KELBY: I object to that as immaterial, irrelevant and incompetent. The Supreme Court of the United States paid very little attention to it in the San Francisco Savings Union vs. Irwin.

The COURT: Overruled, an exception.

(The letters were received in evidence as "Plaintiff's Exhibit QQ".)

PLAINTIFF'S EXHIBIT QQ.

[Endorsed]: Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Commandant, Navy Yard, Mare Island, California, to the Registrar, State Land Office, Sacramento, California, under date of November 24, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN,
Public Works Officer.

August 11, 1931.

Navy Yard, Mare Island, Cal.
November 24th, 1873.

Robert Gardner, Esq.,
Register, State Land Office,
Sacramento, Cal.

Sir:

My attention having been called to the fact that certain parties hold certificates of purchase from the State of California to the tule land of Mare Island.

The purchasers at some future time will probably apply for patents for the same.

I feel it my duty hereby to notify you that this land is claimed and occupied by the U. S. under order from the Navy Department of the U. S. at Washington, D. C. the same having been purchased January 4th, 1853, after the Commissioners of the U. S. under the Act of Congress, approved March 3d, 1851, had confirmed the title under which the U. S. now holds the land.

I further feel it my duty to protest against any action antagonistic to the ownership and possession by the Navy Department of the U. S. of Mare Island and the tule thereto belonging, as well as in the words of the deed—"its waters, creeks, harbors, bays and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging.

I am,

Very respectfully,
(Sgd) JOHN RODGERS,
Rear Adml. & Commandant.

A chart showing the property held and occupied by the U. S. is herewith enclosed.

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Surveyor General, State of California, Sacramento, California, to the Commandant, Navy Yard, Mare Island, California, dated Novem-

ber 25, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN,
Public Works Officer.

August 11, 1931.

STATE OF CALIFORNIA
OFFICE OF
SURVEYOR GENERAL

Sacramento, Nov. 25th, 1873.

Admiral Rodgers,
U. S. N.

Sir:

I have the honor to acknowledge the receipt of your protest against the issuing of patents by the State, for certain lands sold as swamp & overflowed, adjacent to Mare Island. It has been placed on file with the accompanying map, showing the land claimed by the U. S.

Respectfully,
(Sgd) Robert Gardner,
Surveyor General.

Commandant's Office. Received Nov. 26, 1873.
Navy Yard, Mare Island, Cal.

Mr. PECKHAM: We offer in evidence Defendant's Exhibit for identification No. 4, and the companion map for identification, No. 7, and ask that the two be annexed and marked as one exhibit.

(The documents were received in evidence as "Plaintiff's Exhibit RR".)

We next offer in evidence a letter from Edward T. Nichols, Chief of Bureau of Yards and Docks, to Honorable William E. Chandler, Secretary of the Navy, Washington, D. C., dated December 22, 1883.

Mr. KELBY: We object to that as absolutely incompetent and that it is cumulative anyway.

The COURT: Overuled, an exception.

(The letter was received in evidence as "Plaintiff's Exhibit SS".)

PLAINTIFF'S EXHIBIT SS

[Endorsed] Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California
10 August 1931

I hereby certify that the annexed five (5) sheets are photostatic reproductions of a copy of a letter from the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., to the Secretary of the Navy, Washington, D. C., dated December 22, 1883, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN
Public Works Officer.

BUREAU OF YARDS AND DOCKS
No. 55

Navy Department,
Washington, D. C.
Dec. 22nd 1883.

Sir:

In compliance with the endorsement of the Judge Advocate General upon a letter from the U. S. District Attorney of California S. G. Hilborn, dated Dec. 5th 1883; I respectfully reply.

It appears from Mr. Hilborn's letter that a Suit has been instituted against the Government for the recovery of a large tract of tule land, a part of Mare Island, California, upon which the Navy Yard is located; and of which it has been supposed the United States was owner by purchase. Mr. Hilborn applies for a copy of the field notes and Survey of Mare Island (Original Survey) in the hope that it will show this swamp or tule land was embraced in said Survey.

Mare Island was selected and recommended as a suitable location for a Navy Yard in 1852, by a Board of Officers appointed for that purpose by the then Secretary of the Navy. After diligent and careful search the only "plat of Survey of Mare Island" made by this Board, that can be found in this Bureau, has the following title

"Plan of Mare Island, California, showing the topography and soundings through Mare Island Strait. To accompany the Report of the Board appointed to select a site for a Navy Yard in the

Bay of San Francisco, 1852," and signed:

John D. Sloat.
Wm. S. Ogden, Com'dr. U. S. N.
Simon Fraser Blunt, Lt. U. S. N.
W. P. S. Sanger, Civil Engineer.

This plan embraces only that portion of the Island lying opposite the City of Vallejo, and is evidently the one accompanying the "Report of the Board". Said Report is not on file in this Bureau and cannot be found. All the "field notes" to be found, are embraced in four books and consist entirely of angles and soundings of no value whatever, unless they could be referred to the "Original plan"; the one in the Bureau is undoubtedly a copy of the original. This plan does not show the "tule" or "Swamp land" in dispute, though it does show a junction of this tule with the Main Island. A coast Survey map of 1850, which was in the possession of the Board, shows an immense body of tule, joined to (and extending in a North West direction from the high ground of) Mare Island, and the whole extent entirely surrounded by water.

Lieutenant Simon Fraser Blunt, one of the Members of the Board to select a site, was one of the Officers who made this Survey, two years prior to the organization of the Board.

A decree of confirmation to George W. Bissell, et al, on file in the U. S. Surveyor General's Office, San Francisco, closes as follows, "the place of which confirmation is hereby given, is situated in the Bay of San Francisco, and is called "Isla de la Yegua" or Mare Island, and being an island is bounded by the water's edge."

December 13th 1852, the Secretary of the Navy, Hon. John P. Kennedy, addressed the Board as follows, in regard to the value &c. of this Island:

"I desire to have your estimate of its value, with all its appendages and advantages, regarding depth of water harbors &c." On the same date the Board replied as follows: "The Island, including the tule opposite Vallejo, contains about nine hundred acres, in addition to a large tract of tule extending towards Napa and Sonoria."

I have italicised a portion of the above reply, to show that the direction indicated corresponds with the direction given to the tule in the Coast Survey map of 1850.

It seems perfectly clear, from all the circumstances, that this disputed tule land, was considered by the Board, a part and parcel of Mare Island, and was so included in the purchase.

The decree of confirmation which I have cited, bounds Mare Island by the "water's edge." The Coast Survey map before described shows this tule land and the solid portion of Mare Island, as one continuous body surrounded by water.

The letter of Mr. S. G. Hilborn, is herewith returned.

Very respectfully,
Your Ob'dt Serv't,
ED. T. NICHOLS,
Chief of Bureau.

Hon.
Wm. C. Chandler,
Secretary of the Navy,
Washington, D. C.

(Testimony of Carl A. Carlson.)

Cross Examination by Mr. Kelby.

The Sloat Board used the Ringgold Charts as the general plan of Mare Island. That is related to in the Board Report. I do not know from that whether that Board prepared a map or not. I use the term "map" differently, perhaps. I use the term "map" for a chart or something that indicates the location. I have seen the chart of San Pablo Bay, showing Mare Island, in addition to the other maps which are identified as Plans 7 and 8, which purports to have been prepared and adopted by that Board. Lieutenant Blunt, who was a member of the Board, worked on that two years before the Board got there. I don't know where the original plate is, but the published [297] charts are still in existence, that is, the two Ringgold charts, which were the foundation of that survey by Blunt, but other than that, I could not say one way or the other, that there was a separate map of Mare Island prepared by Blunt.

Q. Did you ever see any map of Mare Island which purported to have been made by the Sloat Board. A. Yes, the Ringgold charts.

WITNESS continuing: Lieutenants Blunt and Cutts worked on the Smith Board prior to the arrival of the Sloat Board and they were working for the Sloat Board getting this data ready so that when the Sloat Board came out they had a number of sites to examine and they were not going to make an entirely new map when one had been in the course of preparation for the last two years. I don't know whether they produced or made a map or chart that was founded on the Ringgold survey.

(Testimony of Carl A. Carlson.)

I have never seen any map or chart of that kind. The others, 7 and 8, are just plans and are referred to in the report which I have identified. The tidal readings to which I have referred were not kept from data in the Mare Island Navy Yard, but were prepared from the data on record at Mare Island. Mr. Greathead assisted me in that and he is fairly familiar with all of that type of work.

The object of the reconnaissance made by me together with Mr. Peckham and others in July of last year was, I wanted to see where the point was where they turned off to pick up the north end of the island. I indicate the point on the chart with an "O". When I arrived at that point, we wanted to locate it first as Joy located it, as near as we could. We turned off north something, .70 something west —we turned off at this angle. That terminated 800 yards distant, we found from here up to the Bascule Bridge, crossing Sonoma Creek. I got my basis for the 800 yards, I think, from the instructions and notes of Joy. My object was to locate this point in reading that angle—I got the angle to this line, that is as far as the bearing goes. It would be 70 something west, [298] that is, the total angle from the north and south is about 70° west of north—due west would be 90°.

Mr. PECKHAM: With counsel's permission, I just want to introduce a couple of questions.

Captain, you testified to certain lines run on the levels in the year 1917. I call your attention to a map from the record of the Navy Yard, showing such contours: Is that the contour map that you had made and surveyed at that time? A. Yes.

(Testimony of Carl A. Carlson.)

(The document was received in evidence as "Plaintiff's Exhibit TT".)

WITNESS continuing: All of these levels, Rousseau's level of 1906, my own level of 1917, and the level of 1931, were all after the reclamation of that land by Cross. Cross, to my knowledge, had no connection with the Government in any way.

Mr. PECKHAM: We would like to offer also a copy of a Sheriff's Deed to Edwin H. Sawyer under date of 1870, recorded in L-1 of Deeds, page 423 of the records of Solano County. This is not certified.

Mr. KELBY: I do not object to it because it is not certified.

Mr. PECKHAM: I would ask that this be admitted as part of Government's Exhibit W. There is another exhibit, Defendant's Exhibit 11 for Identification, which contains a plat of the Freeman Survey, which is neither of our plats.

Mr. PECKHAM: There is another exhibit, Defendants' Exhibit "L" for identification, which contains a plat of the Freeman survey, which is neither of our plats, signed by Superior General Ames and certified by John O'Connell. We would like the privilege of substituting the original, together with any correspondence that is attached to it, if it can be found in the land office.

Mr. KELBY: Proved also that it be the original of that map.

(The map, Defendants' Exhibit 11 for identification, is received in evidence as "Plaintiff's Exhibit UU".)

(Testimony of Carl A. Carlson.)

Cross Examination Continued. [299]

Mr. KELBY: Captain, it may be interesting to you to know that I believe entirely in your competency, as well as your integrity, but still we are desirous of finding out the object of this reconnaissance in July, last year. Now, you started out to find the east line, did you?

A. We went out to locate that point on the Joy Survey, which is a re-running of the Dyer Survey.

Mr. KELBY: We still assume that this is the description contained in the Executive Order of President Fillmore, and which I believe is postulated on the Smith Survey Report, "The land on the Eastern side of Mare Island straits beginning at the high hills *be-* between those straits and the City of Benicia, about 2000 to 2500 [300] yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the Straits so as to joint them at a point about 800 yards north of the northernmost high hills on the eastern side of the Straits." Is that what you started out to do, to establish those stations?

A. I indicated the point where the Dyer and Joy survey established the point, where this line turns off that runs to the river. I testified that we set up the instrument and pointed it off some 70 degrees and picked up the Bascule Bridge on Sonoma Creek.

Q. What is the reference to the Bascule Bridge in the language that I have just read?

A. That is approximately the northern end of Mare Island.

(Testimony of Carl A. Carlson.)

Q. What do you mean by "Mare Island"?

A. The physical high land.

Q. By the physical high land, you mean the entire island. A. Yes.

Q. Up to the northerly boundary of 569?

A. Well, up to the water boundary with Pacheco Creek. That is the boundary indicated on the chart.

Q. Why did you establish the point of commencement coincident with the letter O? Where did you derive that from?

A. Because that is in the Dyer and Joy Survey; they establish that point. I just tried to roughly relocate it for a reconnaissance.

Q. Did you draw a line from that point in any direction? A. No.

Q. You just simply tried to see whether you could see any distant point westerly from that?

A. Well—

Q. Tell us about it, Captain, in your own language.

A. I swung off some 70 degrees from the north and south line, which was also the bearing of that old line up to the Napa River, and it practically coincides with the ridge for that sort of an examination.

Q. Now, Captain, if I understand you correctly, the levels of 34 have been constantly declining ever since you became familiar with them: Is that correct?

A. Well, ever since the 1906 records, and probably it has continued long before. That settling is

(Testimony of Carl A. Carlson.)

due to prob- [301] ably two major causes or two things. The major one is the dyking off and the robbing of the land from the normal overflow. The accumulation of debris, hydraulic mining and other debris, also built up a partial barrier, cutting it off, and then, of course, the work of man on that area, interfering with the robbing of the land, is very detrimental, because after Dr. Cross built his dykes, it introduced a very severe condition; he checked off and left a place that was cut off from the normal flood waters, and all that.

Q. Did this dyke extend along 34 longitudinally?

A. It went outboard of 34 quite a bit. It was extended on the accretions that were formed since the '50's, that is, since the original surveys were made.

Q. These surface reductions have been constantly progressive since what date—1906?

A. In 1906 we have a definite survey record.

Q. And if those declinations shall continue in the same ratio, it won't be very long before you will be entirely below the sea level in that vicinity, will it?

A. That is a problem I would not want to answer offhand. The rate of subsidence, of course, will gradually diminish. It will depend upon the material underlying 34, the relative amount of peat and sand or silt in the soil. I had a conversation upstairs with Captain Whitman, and he tells me Mr. Greathead and himself are the only ones that can bring such data if it exists. We have some records to illustrate the extent of the fill, and the next wit-

(Testimony of John F. Greathead.)

ness, I think, will throw some light on that. If you mean the cubic yardage, I doubt if they have any record at the yard, for the reason that the fill was simply a by-product of the dredging of the channel.

The COURT: Let a search be made and if you have it, produce it.

TESTIMONY OF JOHN F. GREATHEAD, A Witness for Plaintiff.

I am a civil engineer by profession and have been attached to [302] the Engineering Department at Mare Island since 1918. Prior to that time, I worked for the Subway Companies in New York and Philadelphia; and prior to that my experience has been, briefly, four years designing and constructing dams on the Barge Canal of New York, six years assistant engineer in charge of subway construction in New York, one year as Division Engineer on the Philadelphia Subway.

I am familiar with the Freeman Survey, also with Swamp and Overflow Survey 34, also with the Coast and Geodetic Survey on Mare Island. The swamp and overflow lies within the limits of the Freeman Survey and also lies within the Coast and Geodetic Surveys of Mare Island and within the high water line as determined by the Coast and Geodetic Survey.

Q. Directing your attention to the Government's Exhibit "H", I call your attention to the two plattings here of swamp and overflow survey 34 and

(Testimony of John F. Greathead.)

ask you if the survey in red properly responds to the physical outline of Mare Island?

Mr. KELBY: I object to that as calling for the conclusion of the witness. The map, itself, is the best evidence.

The COURT: Overruled, an exception.

A. The area indicated in red here is not the Wade Hemecourte—

Q. That is the Darlington Survey? A. Yes.

Q. The Wade Hemecourte Survey is the area on which the Darlington patent issued?

A. It was a survey of this land by Patton and resembles in all except unessential details the official plat and the location indicated on this map in red closely resembles the original shores of Mare Island as shown on the Coast and Geodetic Plat, I have made this big chart of the Joy survey. It is a map not only of the Joy sectioning, but all of the sectioning within those confines. We secured certified copies of all of the township maps and inserted them in their proper place. The delineation of Swamp and Overflow 34 is shown on that map as a sort of greenish blue line. I tried to indicate it in the position which was undoubtedly in the mind of the original County Surveyors; I could not use their ties to section corners as they were not the official section corners [303] at that time.

Q. Have any section corners ever been erected that those correspond to?

A. The point of beginning of the four parcels which constitute Survey No. 34 have not been officially established.

(Testimony of John F. Greathead.)

Q. The depiction of that upon the map of Mare Island is by taking physical monuments where physical monuments are mentioned and using points on the survey to accord with those physical monuments? A. That is correct.

Mr. PECKHAM: Q. And one of the calls of that Darlington survey was as it ran following the sinuosities of the upland? Isn't that so?

A. Substantially.

Q. The south end of the Darlington survey did follow the sinuosities of the upland, and you have simply pivoted that line, that point, on the engineering building, and swung the map to correspond with the shore lines of Mare Island?

A. To elaborate just a little bit, I took the surveys of 569 and 34 under consideration at one time; they have a common boundary; so, fitting the two together, I swung the two together about the upland that they pivoted upon, so as not only to show 34 in its proper position, but also the adjacent 569, in fairness to all concerned.

Q. The purpose of that was definitely to locate this land on Mare Island on the land rather than to follow the section and Government subdivisions as mentioned in the Darlington survey: Is that correct?

A. Yes, except that the Darlington survey notes did not, of course, refer to Government subdivisions, but to section lines, that in the absence of any official ones were located by the county engineers in their own manner, which turned out later not to be the official manner.

(Testimony of John F. Greathead.)

WITNESS continuing: I am familiar with the lay of the land at Mare Island at present. The airplane map at Mare Island, Government's Exhibit "HH", which is now shown me, is an excellent photograph of the present conditions at Mare Island. I am familiar with [304] the Rousseau Map of 1906, which has been marked Government's Exhibit "RR", and with respect to the line and contours on said map, marked "Sand and Shell Ridge", state that it represents the remnants of the original sand ridge which lay at the upper part of the westerly beach and portions of it are still to be found in that location. I have recently made a study of the remains of that beach. I was greatly interested in seeing upon the airplane map what appeared to be a line of beach. It was so plain that I went up to the northerly end of the present area and observed that there seemed to be on the easterly side of the cultivated area a line of white area which conceivably might be the picture of the sand dunes. It was so plain that I went out to the side and viewed it from a distance of 500 feet to the west of the road and was surprised to find the sand dunes standing up in a way I had never seen before, by reason of the fact that fresh grain, I think it was rye, had grown up through the sand, but in growing over the sand, left the white sand plainly visible as a band extending as far as you could see, so I took samples of the sand and analyzed it for sand content. I went only four hundred feet into Survey 539, but took samples along the trail shown on the photograph all the way down to where artificial fills made it im-

(Testimony of John F. Greathead.)

possible. In other words, twenty-four hundred feet south of the north fence.

The line of wider area on that map represents the artificial fill from dredging and samples were taken down at that line. The north limit of 34 substantially is the present fence, which I have marked on the map as "AA", and is determined as the common boundary between 539 and 34 by the Joy Survey.

Mr. KELBY: Might I ask a question before you go into another subject?

Mr. PECKHAM: Yes.

WITNESS continuing: About 400 feet westerly of the old sand ridge, paralleling the San Pablo Bay Shore is an artificial eleva- [305] tion, a dyke was running longitudinal with that beach section perhaps 400 or 500 feet west of it. There is also a levee east of it, entering Napa River shore line. There is no levee closer than 400 feet to the sand beach at the north end of the reservation. I paced the width of the sand, which was quite loose, and which could be kicked up with the foot and it paced fifty to sixty feet. The levee west of it shows plainly on the map. It shows in the picture. These white lines in the photograph constitute the traces of the old sand ridge and let us say 400 feet west of it is the levee, on which is the road. The land in between is cultivated. The road starts at the Navy Yard and comes up there—then you pass the Rifle Range. It is only in fair shape outside of the gate to the fence of the reservation to the junction with the privately owned Pedro Point Toll Road. The sand is shown by these white spots or diamonds. To bring out the nature of

(Testimony of John F. Greathead.)

the soil, I not only took samples along this sand ridge, but also a few at odd points elsewhere and the rest of them are loam, but just along there you have from 80 to 100 per cent sand. The levees that I have just referred to lay within the accretion of 34 and are on the westerly side of Mare Island for a distance of two miles. The levees are simply to keep the soil from being washed out into San Pablo Bay.

Q. Will you produce your plat showing the stations from which you took those samples?

A. Might I say that I have with me today only a series of samples of sand taken on the 8th of August, 1931? However, a dozen of them were taken haphazard at even stations. On the 1st of April, 1932, after I had made this inspection of the ground, I took many more samples, and these are not here today, but they have been platted as to sand analysis.

Mr. PECKHAM: Do you want to see the chart?

Mr. KELBY: I do not see how that would help us, as we are not claiming any sand on 569.

Mr. PECKHAM: Does that plat indicate samples taken from 569 or from 34?

A. Most of the samples are on No. 34; just a few odd ones are taken on 569. [306]

Q. This station O, station 1 plus 15, 2 plus 65, 4 plus 50—

A. (Interrupting) Those stations or figures represent the 100 feet, or 200 feet, or 400 feet plus 50, in the usual engineering manner.

Q. Is that the usual engineering manner?

A. Yes.

(Testimony of John F. Greathead.)

Q. Starting from O, you get on the north line of 34, which is close to the Joy monument? A. Yes.

Q. So that station 1 plus 15 means 115 feet south of that monument? A. Yes.

Q. 2 plus 65 means 265 feet. A. Yes.

Q. And so on down to station 23 plus 80, which brings you to a levee? A. Yes.

Q. Did I understand you to say that you took samples of sand in all of those locations? A. Yes.

Q. What percentage of sand did they run?

A. They run from 25 per cent, sand at the most southerly end to 100 per cent.—most of them are above 80 per cent., with the exception of a few samples not taken along the sand ridge, but elsewhere, as located on this map from a comparison.

Mr. KELBY: Q. That is all from the accretion portion of the land, is it not?

A. No, the bulk of the samples were taken along the sand ridge which was the westerly boundary of Swamp and Overflow Survey No. 34, from the description and field notes of the original survey.

Mr. PECKHAM: I offer that in evidence as Government's Exhibit next in order.

Mr. KELBY: I object to that as incompetent.

The COURT: Overruled, and an exception.

(The document was marked "Defendant's Exhibit VV.")

WITNESS continuing: One of my duties is to investigate the tidal data at Mare Island. The datum plane at Mare Island is 110½ feet below the top of the drydock No. 1. It was originally the Navy Yard monument. This incidentally formed the datum for

(Testimony of John F. Greathead.)

one of [307] the minor Coast and Geodetic Survey determinations of the tidal plane. This datum has primary connection with tidal plane. It is the physical distance down from the top of the stone drydock. It was intended to make that coincide with mean lower low water and it does, but should mean lower low water fall in the future, as perhaps it has in the past, our datum would still be fixed at 110½ feet below the top of that stone drydock. It is a mark made by the Navy Yard, but the Coast & Geodetic Survey for four and one-half months made tidal observations at that point, adopting the Navy Yard's monument. The Coast & Geodetic Survey have their own monument at the southerly end of the Navy Yard.

This bench mark is an object permanently fixed at a specific level from which an engineer may run the levels and determine their datum plane anywhere on the island. The mean high tide level above the datum plane at Mare Island is the average of six years' and eleven months' observation, a very good series gives that elevation as 105.8 feet above the datum plane. The datum plane is one hundred feet below the present mean of lower low water. I know the line of the Dyer Survey of 1863, which is their survey establishing the boundaries of Reservation No. 7 of President Fillmore, in the year 1862. That line was resurveyed by Joy in 1923, in connection with the sectioning on the easterly side of Mare Island Straits. It was necessary to re-run the Dyer Survey as you see his lines come down to that reservation line and stop. All lines that come down

(Testimony of John F. Greathead.)

to the boundary line of Reservation 7 are Joy's lines.

Q. Does the Joy re-survey of that line coincide with the Dyer Survey?

A. In his notes he says he relocated it as accurately as it may be. I have picked up the line of the Dyer Survey to find the initial point that Dyer mentioned. I have a plat of that, which I made November 6, 1931, which I now produce. I think I found the north line of Reservation No. 7 with pretty good accuracy. From the northerly angle point of Reservation No. 7, pointing the *tele-* [308] *after* a solar observation along the true bearing of the Dyer Survey which was north 76 degrees 30 minutes west, we found that that northerly line prolonged to Sonoma Creek was very close to the Bascule Bridge on the Sears Point Road which crosses that creek. *Thine* line did not cross Swamp and Overflow Survey 34 at any time. It was about four-fifths of a mile north from the nearest point of it; that is, 4/5ths of a mile north of the north boundary of Swamp and Overflow 34.

(The document was received in evidence as "Plaintiff's Exhibit WW".)

Mr. PECKHAM: Now, if your Honor please, we would like to offer the big long map as Government's Exhibit next in order: For the convenience of the Court, we submit also with the same number a photograph of the exhibit.

Mr. KELBY: We object to the introduction of this map except for illustrative purposes. We are perfectly willing it should go in as an aid to the Court, but not as evidence in this case.

(Testimony of John F. Greathead.)

The COURT: It is offered for that purpose, as I understand it.

Mr. PECKHAM: Yes, that is all.

(The map was received in evidence as "Plaintiff's Exhibit XX".)

Cross Examination by Mr. Kelby.

I am not thoroughly acquainted with the details of Mr. Joy's activities in 1923, and back in that vicinity. He sectionized on both sides of Mare Island Straits and Napa River and I have seen his notes that pertain to Reservation No. 7, but it appeared to me evident that in terminating his section lines adjacent to Reservation No. 7, he had to re-run the boundary line of that reservation, which he did.

I understand that he extended the section lines to land embraced in Survey 34 and that they were disapproved.

Q. Do you know by whom they were disapproved? A. I do not.

Q. Do you know whether they were disapproved?

A. I do not even [309] know that, I simply have been shown a map which is not an official map, that it seemed to show that he ran his sectionizing farther than he had been instructed to and I was informed that he had been told to remove the evidences of that survey.

Q. Is that your own information, that it was disapproved by someone having authority to disapprove it?

A. No, I think I am not a competent witness on that matter.

(Testimony of John F. Greathead.)

Q. In other words, you don't know—is that it?

A. Yes. I do not know whether there is any difference between the term "sectionized map" and "subdivision map". I am not an expert on those technical terms either, which are General Land Office terms. I could not say that I would be an expert or familiar with what is known as a subdivisional survey.

Q. And yet you are a surveyor and civil engineer?

A. Ordinarily I would consider that a sectionized map was one which showed the township lines and the section lines.

Q. I show you a photostatic copy of a map or chart that I have marked for identification as "Defendant's Exhibit 12", and ask you to state what it is, if you know?

A. I would rather have you ask an expert in the Land Office the difference between this and an approved survey.

Q. Does it depict a subdivisional survey?

A. Yes, it depicts a subdivisional survey.

Mr. PECKHAM: I offer in evidence criticisms of the map of 1854, as shown by the experts from the records of the State of California.

Mr. KELBY: To which, of course, we make the general objection, it is immaterial, irrelevant and incompetent.

The COURT: Overruled, an exception.

(The document was received in evidence as "Plaintiff's Exhibit YY".)

PLAINTIFF'S EXHIBIT YY.

[Endorsed]: Filed May 5, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

MEMORANDUM CONCERNING THE OFFICIAL MAP OF THE STATE OF CALIFORNIA OF 1854.

Concerning the Official Map of the State of California of 1854 (defendants' Exhibit No. ——), the annual reports of the State Surveyor General for the several years immediately preceding and following the publication of the map contain much information as to why and wherefrom the data and material from which the map was compiled were secured. These annual reports also contain reports of the various county surveyors on the subject matter. The following extracts of these annual reports of the State Surveyor General are here set forth for information and convenience.

The report of the State Surveyor General, dated December 15, 1852, published as Senate Document No. 3, (Session of 1853) and printed as an appendix to the Journal of the Senate (4th Session) contains the following information concerning the official State Map:

p. 3. "STATE MAP—THE PROGRESS OF ITS CONSTRUCTION.

The last Legislature, near the close of the session, passed an Act to 'provide for a map of the State,'

and appropriated the sum of three thousand dollars to carry out the work.

In a special report made from this office (in answer to a call from the Senate) on the 18th of February last, I set forth the importance and necessity of a correct map, and submitted an estimate of the amount that would be required to get one up. In the month of April a bill was introduced into the Senate, ordering me to compile as correct a map as could be made from data to be collected from various sources; this bill unanimously passed that body appropriating the sum of eight thousand dollars to carry out the design, but was met in the Assembly by a strenuous opposition, and the appropriation cut down to three thousand dollars.

Though it was well known to the friends of the bill, that this sum was totally inadequate to carry out its provisions in full, it was deemed expedient to commence the work and be governed by circumstances in its prosecution.

Accordingly, I immediately took steps to procure the necessary assistants and instruments, and to secure as full data as possible.

Knowing the importance of the work done by the United States Topographical Engineers in sections of the State where it is impracticable for a small party to go with safety, and more particularly the northern portion of the State, I made application, early in May, to General Hitchcock at Benicia, for copies of such maps as had not been published by the Government.

General Hitchcock expressed an interest in the work, and a desire to aid therein by furnishing all the information in his power. But as the regulations of the Topographical Corps made it imperative to have authority from the Bureau at Washington, before such information as was in possession of the Topographical Corps here, could be furnished, it became necessary to apply to Col. J. J. Abert, as Chief of the Corps of Topographical Engineers, for an order to that effect.

On this application being made through your Excellency, the necessary order was promptly issued by Col. Abert, and notice of it forwarded to me through Senator Gwin.

General Hitchcock, upon the arrival of the order to Lieutenant Williamson, afforded every facility for the prosecution of the work, and the archives were opened freely for my examination.

The survey of the Salinas River and of the Tulare Valley, from its head to the San Joaquin, and on both sides of the Lakes by Lieutenant Derby of the Topographical Engineers, and the surveys and explorations made by the corps for the last three years in the north part of the State and in Oregon, collated by Lieutenant Williamson; also a map made by Geo. Gibbs, Esq., who accompanied Col. McKee, the Indian Agent, were used by me in constructing the map.

Having been informed that during the summer of 1851, Capt. Sitgreaves of the United States Topographical Engineers had come through from New

Mexico, striking the Colorado high up, I immediately addressed Col. Abert the following note:—

STATE SURVEYOR GENERAL'S OFFICE

p. 4 Sacramento, June 14, 1852.

Sir:

Having been informed that Major Kendrick of the Army, and Captain Sitgreaves of the Corps of Topographical Engineers, on crossing the country from New Mexico in 1851, struck the Colorado in the vicinity of the 35th parallel, and that Captain Sitgreaves had reported to you the result of his reconnoisance, I take the liberty of applying to you for a copy of the report and map if they have been published; or if they have not as yet been published, and it is compatible with the regulations of the Bureau, I desire to get a copy of so much as relates to the Colorado River.

I have been ordered by the Legislature of this State to collect all the data than can be obtained from various sources, and compile as complete a map of this State as is possible.

You are aware that a portion of the eastern boundary of this State is a diagonal line, running from the intersection of the 120th meridian and the 39th parallel to the Colorado at a point where the 35th parallel crosses it.

The determination of this point is of great importance to this State, and is one of those cases, where owing to a combination of untoward circumstances we are compelled to look to, and await the action of the General Government.

Any information relative to this, or other matters connected with the geography of this State, will be thankfully received and duly acknowledged.

Please direct to me at San Francisco.

Respectfully your obedient servant,

(Signed) WM. M. EDDY.

To Col. J. J. Abert,
Chief of the Bureau of
Topographical Engineers.

In answer to which the following reply was received:

BUREAU OF TOPOGRAPHICAL ENGINEERS
p. 5 Washington, July 17, 1852.

Sir:—

I have received your letter of the 14th June, the report and map of the expedition under Captain Sitgreaves are not yet completed, as soon as these are completed and printed, copies will be sent to you.

I understand from Captain Sitgreaves that he encountered the Colorado north of the 35th parallel, and, as he surveyed the river from that point down, his map will no doubt furnish much information.

Other reports of that country have been printed, as soon as we get copies of them I will see that you are supplied.

Respectfully, Sir,
Your obedient servant,
(Signed) J. J. ABERT,
Col. Corps, Top. Engineers.

WM. M. EDDY, Esq.,

Surveyor General, San Francisco, Cal.

I thus have secured to the State map the result of all the work of the Topographical Engineers in this State for the last four or five years, and the information gained is the more valuable, inasmuch as it covers the most dangerous portions of the State.

Much credit is due to Col. Abert for the promptness with which he responded to the application, and to General Hitchcock and his aid Major Townsend, and likewise to Lieut. Williamson, for the lively interest they have taken in the matter, and the facilities they have afforded.

In the mean time, knowing that the Assistants in the Coast Survey had completed the line of the coast from Initial Point, below San Diego, to Oregon, together with the survey of the islands along the coast and the various bays, I addressed a letter to Prof. A. D. Bache, Superintendent of the Coast Survey, and the following correspondence took place:

STATE SURVEYOR GENERAL'S OFFICE

p. 6 Sacramento, May 28th, 1852.

Sir:—

By an Act of the Legislature of this State, 'to provide for a Map of the State of California,' passed May 4th, 1852, I am directed to include in said map 'all the data which can be obtained from the United States Coast Surveys,' as well as other sources. The information collected under your di-

rections in this State is of vast importance to us, and I trust it may be furnished this office at as early a date as possible. It is desired to include in the said map the work as far as completed, and also such work as may be added during this season. If compatible with the regulations of the Coast Survey, please forward me duplicate copies of such work as has been published, and authority to procure from the Assistants on this coast a copy of such work as may accrue up to the month of November of this year.

An answer at your earliest convenience, directed to me at San Francisco, is respectfully solicited,

Your obedient servant,

(Signed) W. M. EDDY,

Surveyor General.

PROF. A. D. BACHE,

Superintendent Coast Survey,

To which I received an answer through Capt. R. D. Cutts, Assistant on the Coast Survey, as follows:

U. S. SCHOONER BALTIMORE

p. 6 Astoria, O., Sept. 7th, 1852.

Sir:—

I received to-day, from the Superintendent of the U. S. Coast Survey, a copy of a letter addressed by you to him, dated at Sacramento on the 28th May last, requesting to be supplied with all the data collected by the Coast Survey in California, in order that the same may be applied in the construc-

tion of the State Map ordered by an Act of the Legislature, passed May 4th, 1852.

By the regulations of the Department, the Superintendent is authorized to furnish information from the archives of the Survey on condition that the parties receiving it give full credit to the Coast Survey for such information, and also pay for the cost of copying, drawing, etc.

The estimated expense of supplying you with the data required is stated by the Assistant in charge of the office in Washington, to be about $300.

I have been requested by the Superintendent to inform you of the above regulation, and to enquire if the arrangement with respect to the expense would be satisfactory to you.

As I shall not return to California until October, it would materially hasten the matter were you to direct your reply to this note to Prof. A. D. Bache, Washington City.

I am very respectfully, &c.,
(Signed) RICHARD D. CUTTS.

To Wm. M. Eddy, Esq.,
State Surveyor General.

SURVEYOR GENERAL'S OFFICE

p. 7 Vallejo, Sept. 25, 1852.

Sir:

I have just received from R. D. Cutts, Esq., Assistant on the U. S. Coast Survey, a letter dated at Astoria, Oregon, informing me of the regulations

of the Department in reference to information furnished from the archives.

I will conform to the regulations and give 'full credit' upon the face of the map, and will pay the office charges as you may see fit to direct.

Please forward me at once a duplicate copy of all such matter as has been printed, and a copy of that still unpublished, at the earliest possible moment.

I am desirous of completing the map by the 1st of January next, and therefore permit me to solicit the forwarding of the printed matter by the mail of the 5th November, and the other by the mail of the 20th November.

Please direct your communications to me at San Francisco.

Very respectfully,
Your obe't serv't
WM. M. EDDY,
Surveyor General.

To PROF. A. D. BACHE,
Superintendent U. S. Coast Survey.

OFFICE COAST SURVEY
Washington City, Nov. 3, 1852.

Sir:

Yours of the 25th September, addressed to the Superintendent, has been received, and by his direction I hasten to reply, that I this day send by mail, addressed to you at San Francisco, a roll containing

the following published maps to wit: (two copies of each)

p. 8

McArthur's Reconnoisance.
San Diego Bay.
Trinidad Bay.
Point Conception.
Point Pinos.
Mare Island Straits.
San Francisco City.
Monterey Harbor.
Catalina Harbor.
San Pedro Bay.
San Francisco Bay.

The roll will then go by the steamer of November 5th. Tracings of all the unpublished surveys of the Western Coast will be made and forwarded by steamer of November 20th.

Yours, &c.,

(Signed) ISAAC D. STEVENS,
Assistant in charge of office.

WM. M. EDDY, Esq.,
Surveyor General, San Francisco, Cal.

OFFICE COAST SURVEY

p. 8

Washington, Nov. 18, 1852.

Dear Sir:

By directions of the Superintendent, I send to-day, to your address, per Adams & Co.'s Express, a case containing tracings of the unpublished surveys of California by the Coast Survey, and copies of the published maps, (two copies each,) issued since the

date of my last communication, as per inclosed lists. Inclosed I also send a list of geographical positions in California, and table of the latitudes and longitudes of points between San Francisco and San Diego. Should you desire it, descriptions of the stations can be furnished you.

The cost of preparing the tracings is $175, which please remit.

Those which are marked with a cross (X) will go by the steamer on the 25th inst.

Yours, &c.,

ISAAC D. STEVENS,

Assistant in charge of office.

The importance of the information thus derived can be readily understood, when we take into consideration that the whole coast will be as complete upon the map as it is possible to be shown upon such a scale.

I take this opportunity of expressing my thanks to the Department at Washington for their promptness, and to Messrs. Cutts, Alden and Davidson, assistants on this coast, for their courtesy and attention throughout the matter.

That portion of the boundary of the State which lies between the initial point on the Pacific, and the junction of the Colorado with the Gila was
p. 9 furnished me by A. B. Gray, Esq., late United States Surveyor of the Boundary Commission, who kindly allowed me to take a copy of the same, with the adjoining country, from the official map prepared by him for the Department at Washington.

The remainder of the boundaries of the State being astronomical lines, it will be seen that I have met with great success in collecting data enabling me to fix, with precision, the entire boundary lines of California, and I now proceed with a description of the work in the interior, and of my other labors during the season.

In compliance with the 10th section of the 'Act concerning the Office of Surveyor General, Statutes 1850, page 257,' I prepared the following circulars to County Surveyors and County Assessors, which were addressed officially to the respective officers in each county in the State.

SURVEYOR GENERAL OFFICE,

p. 9 Sacramento, June 1, 1852.

Sir:—

I respectfully call your attention to the following extracts from the laws bearing upon the duties of your office in its connection with the Office of the Surveyor General.

1st. From the 'Act concerning the Office of Surveyor General, passed April 17th, 1850.'

Sec. 9. He shall deliver to the Governor, annually, on or before the 15th December, his report which shall contain—

2d. An accurate statement of the progress he may have made in the execution of the surveys enjoined on him by law, and in the preparation of the map of the State.

3d. An estimate of the aggregate quantity of land belonging to the State, and the best information he may be able to obtain as to the characteristics of the same.

4th. An estimate of the aggregate quantity of lands used for, or adapted to tillage and grazing within the State, and each county of the State, together with a description of the locations in which the same may be situated.

5th. An estimate of the aggregate number of horses, cattle, sheep and swine within the State, and each county of the State.

6th. An estimate of the aggregate quantity of wheat, rye, maize, potatoes, grapes, and other agricultural productions of the preceding year.

7th. An estimate of the aggregate quantity of mineral lands within this State, and each county of the State, and the quantity and value of each mineral produced during the preceding year, together with a description of the localities in which said minerals may be found.

Sec. 10. He shall address a circular letter to the County Surveyors and County Assessors, instructing them, and it is hereby made a part of their official duties, to use their utmost diligence in collecting information relative to each and every matter mentioned in the ninth section of this Act, and to transmit to him quarterly, at the Seat of Government, a report in writing, setting forth the result of their inquiries.

Sec. 11. He shall with his annual report transmit to the Governor all reports which he may have

received from his deputies and other persons, as mentioned in the tenth section of this Act.

Your attention as County Surveyor is especially called to the third, fourth and seventh paragraphs of section nine, and it is desired that some especial care shall be taken in collecting the data as required. A sketch of your county, made on any convenient scale, noting all fixed and known points; the range and bearing of mountains and hills; the general course and bearing of all rivers and small streams, with the names thereof; names and locations of all town, villages or settlements, with their distances from each other; is respectfully solicited from you to aid in carrying out the law 'To provide for a Map of the State.'

All geographical or topographical information thus furnished will be duly acknowledged in my Annual Report.

All reports containing the above information must be mailed to this office, (at Vallejo), not later than the first of December, in order that they may be embodied in my annual Report, which I am required to make on or before the fifteenth of December.

2d. From the School Land, or 500,000 acre Land Bill.

'An Act to provide for the disposal of the five hundred thousand acres of land granted to this State by Act of Congress.

Sec. 3. 'The parties purchasing such warrants and their assigns, are hereby authorized in behalf of this State to locate the same upon any vacant and unappropriated lands belonging to the United

States within the State of California subject to such location, but no such location, shall be made unless it be made in conformity to the law of Congress, which law provides that not less than three hundred and twenty acres shall be located in a body.

Sec. 4. 'Lands thus located shall be run off by a line north and south, east, and west, and shall be sufficiently designated by lines and distances, corners or posts, as the case may be, and an entry made thereof in the office of the Clerk of the County Court of the County in which said lands shall be located.'

Sec. 5. 'The location made of lands belonging to the United States as aforesaid, shall secure to the purchaser the right of possession to the land embraced within said survey, until such time as the government survey shall have been made, after which said lines shall be made to conform to the lines of sections, quarter sections, and fractional sections of said government survey; and in the event that two or more persons shall have made a location on the same section, then, and in that event, the person whose location embraces the largest portion of said section, quarter section, or fractional section, shall be first entitled to said location of the same.'

Sec. 6. 'If in the survey to be hereafter made by the General Government, it shall so happen that the improvement made by any person purchasing and locating under this Act shall not comprise the larger part of the first survey, then, and in that case, the party may, if they prefer it, retain that

portion which has upon it their buildings and improvements, although it may be the smaller portion of said section, quarter section, or fractional section: Provided, nothing herein contained shall authorize such location upon any lands heretofore granted by the State, or by the General Government, or on any lands at the time of such survey and location, actually occupied and improved by actual settlers, unless such location be made by the owner of such improvements, not to exceed six hundred and forty acres by any one person: Provided, also, that nothing herein contained shall prejudice the ownership or possession of any lands at the time of said survey and location, held, or claimed under grants from the Mexican or Spanish Government: and Provided, moreover, that at the time of making such location, the first settler or owner of any improvements situated on the tract proposed to be located, shall in all cases have the preference.'

Sec. 7. 'In the event that any location of lands be made under and by the provisions of this Act upon lands supposed to belong to the United States, which should prove to be land not the property of the United States, then, and in that case, the party owning such land warrant or warrants may float the same upon any other public land in the State of California: Provided, the float, and the reasons therefor, be made a matter of record, at the time, in the office where the original location was recorded.'

Sec. 10. 'Lands located under the provisions of this Act shall be surveyed by the County Surveyor, in each county where the location is made, who shall give a certificate setting forth the bounds, and the number of acres contained in such survey, and shall receive for his services such fees as are now or may hereafter be provided by law.'

Sec. 11. 'The clerk of the County Court shall make a record of all certificates of land located under the provisions of this Act, which may have been run off by the proper officer, and shall be entitled to receive from the owner of such location three dollars for such services.'

Sec. 12. 'The County Surveyor of the respective counties of this State, at the end of every three months from the taking effect of this Act, shall make out and forward to the office of the Surveyor General of the State, without fee for the same, a duplicate copy of each plat or survey, and certificate of the location of any land warrant made under the provisions of this Act in their respective counties, and for failure to do so, shall be liable to a fine of not less than five thousand dollars, recoverable before any court of competent jurisdiction on the complaint of any person or persons in interest.'

N. B. All lines run as required above, in section 4, north, south, east and west, must be run by the true meridian, and not magnetic, so as to conform to the lines of the United States land surveys, and the Act takes effect from the 1st day of June inst.

3d. From the law to 'provide for a Map of the State of California.

4

Sec. 3. County Surveyors are hereby required to connect all surveys made by them in their respective counties with, and to some known points to be determined astronomically, or by connection with the United States surveys, whenever practicable, under the direction of the Surveyor General, and report the same to the Surveyor General in accordance with the provisions of the Act 'prescribing the duties of County Surveyors, passed April 9th, 1850.'

Your attention is particularly called to this law, and all returns of surveys under the 500,000 acre land law must be connected as herein provided, and express such connection in plain terms, so that the work can be used in constructing the State Map.

To prevent fraud, endorse on all warrants surveyed by you under the 500,000 acre land bill, the date and number of survey, and for whom surveyed.

Please acknowledge the receipt of this circular at once, and direct to San Francisco.

Respectfully yours,

p. 12 WM. M. EDDY,

Surveyor General.

To ....., County Surveyor.

.....County.

* * * * * * * *

Mare Island.—I would call attention to the fact, that, by an Act passed at the last session de-

p. 16 fining the boundaries of Solano and Sonoma Counties, Mare Island, was left out of both counties, and, at present, is not within the jurisdic-

tion of either, surveys being called for on the Island the past season, I directed the Surveyor of Solano to attend to them."

Senate Document No. 35, also attached as an appendix, is as follows:

"SURVEYOR GENERAL'S OFFICE

Benicia, March 3, 1853.

Sir:—In compliance with the law passed by the last Legislature, 'to provide for a Map of the State', I beg leave to report that the said Map is now compiled, and within a few days will be ready for the engraver.

It will be seen, by reference to the Journals of the last session, that the bill originated in the Senate, and passed that body, appropriating the sum of eight thousand dollars to carry the law into effect. This sum was, in the Assembly, cut down to three thousand dollars.

In my annual report I set forth the amount of work done, and that the sum of three thousand dollars had been totally inadequate to complete the work.

The additional sum of nearly five thousand dollars has been expended by me in compiling the Map. This expenditure was for labor performed and services rendered by other persons than myself, and no charge made for any work done by me.

I respectfully submit, that such expenditures as have been made by me, not covered by the appro-

priations or existing laws, for which I have vouchers, may be audited by the Comptroller.

All of which is respectfully submitted.

WM. M. EDDY,
Surveyor General.

To His Excellency JOHN BIGLER,
Governor of State of California."

State Surveyor General's Report of December 15, 1854, printed as Senate Document No. 5 (Session 1855), attached as an appendix to the annual report of the State Comptroller, contains the following:

Document 5. "MAP OF THE STATE.

p. 5 The official map of California is comparatively worthless in consequence of its great inaccuracy. This fact is established by the almost unanimous testimony of County Surveyors and others, so far as I am in possession of their evidence.

Of the great necessity of having an accurate map I consider it superfluous to speak, and will only refer to some pertinent remarks in the communications of Geo. H. Goddard, Civil Engineer, in appendix F.

For a complete map, a survey of the State boundaries would be necessary, and to accomplish this I would recommend that Congress be requested to make an appropriation.

A survey of County boundaries is also necessary, but this is sufficiently discussed in another part of this report.

Under the head of 'County Roads' I have made some suggestions, which if acted upon, will tend greatly towards furnishing an accurate map.

A competent draftsman should be constantly employed in this office, in compiling from all reliable data now possessed, and what may be hereafter obtained, a map worthy to be stamped 'official.'

I therefore recommend an appropriation for this purpose."

* * * * * * * * *

"CIRCULAR TO COUNTY SURVEYORS"

"THE OFFICIAL MAP OF CALIFORNIA

"I would respectfully request you to com-
p. 27 pare the 'Official Map of the State of California,' a copy of which you will find at the Clerk's office of your County, with the portion of the State with which you are the most familiar, particularly with your own County, and furnish me with the results of your comparison.

Should you find it very inaccurate, an estimate of the expense of making a map of your County, of tolerable accuracy, is desired."

* * * * * * * * *

"As regards the State Map, there is noth-
p. 32 ing right about it, at least so far as my observations have been. Coloma is on the south side of the river, but the map places it on the north. Georgetown bears from Coloma about N.N.E.; the map places it nearly east. Placerville is about S.E. of Coloma; the map places it nearly south. Coon Hollow is between Placerville and Weberville, but

the map places Weberville between the two former. I might thus go on and fill a sheet of paper.

Eddy's observations of the latitude of Placerville places it nearly one mile and a half too far north. Wanting a proper almanac, I have not examined the longitude.

The expense of making a map of tolerable accuracy I think would require near $3000. * * *

WM. HENDERSON,
County Surveyor,
El Dorado County."

* * * * * * * * *

"We have in our office an official map of
p. 46 the State. The County of San Joaquin is somewhat incorrect. The western boundary line should fall due south from the point of starting on the west channel of the San Joaquin River, and should be about twenty miles in length, thence following the Coast Range, nearly south-east, about fourteen miles, thence north-east about ..... miles to the mouth of the Stanislaus River. I am of the opinion that the County is to far north. I believe that the north-east corner of our County is but about fourteen miles north of the 38th dg. of north latitude. I am also of the opinion that the distance from the north-west corner of the County to the San Joaquin River, is much too long. Some of the roads as laid down are not County roads. I can make you a map of this County, on the scale of two and a half miles to the inch, generally quite correct, laying down all of the roads that are truly

County roads, and also others that are traveled, if you wish it, for one hundred dollars. I should be obliged to visit several points on the northern boundary of the County, in order to make up such a map as I should wish to send to you. * * *

GEO. E. DREW,
Deputy County Surveyor of
San Joaquin County."

* * * * * * * * *

p. 56 "I have examined the State Map, and find it about as near a representation as a shirt would be for a night cap! The corner of the county is made within five miles of Sacramento city!—I think it cannot be less than twenty. The Sacramento river is very inaccurately laid down. Suisun bay is improperly represented as the west line of the county. For instance, at Cordelia, the map shows a distance in a northwest direction of fifteen or twenty miles, when it is really not more than seven. * * *

H. P. PATTON,
County Surveyor, Solano Co."

* * * * * * * * *

p. 57 "I have completed a Map of the County of Solano; exhibiting the Government surveys so far as made; the bounds of each of the Spanish grants, designating those confirmed and those rejected; the towns, roads, bridges, mountain and hill lands, tule lands, and other inundated lands, the water courses, county boundary, etc.; a copy of which I will furnish for two hundred dollars. * * *

H. PATTON"

Senate Document No. 17, being report of the Committee on Public lands in relation to a new State Map, submitted March 21, 1855, and also printed as an appendix, reads in part as follows:

"The Committee on Public Lands, to whom p 3 was referred the communication of the Surveyor General, respecting the procurement of sundry official Maps from the United States Surveyor General's office, have had the same under consideration, and beg leave to report as follows:

The need of an accurate and reliable State Map, is felt in almost every legislative measure connected with roads, railroads, county boundaries, and the disposal of the public lands. That no such map has been yet published in this State, is too well known. It is needless, however, for the Committee here to recapitulate the history of the present 'Official' State Map, or to point out its errors and deficiencies. Since the compilation of that map, a much larger amount of authentic materials has been collected, at great expense to the United States, by the different surveying corps, under several departments of the General Government. The County Surveyors have also gathered abundant items of information by their numerous private surveys; and the railroad surveys and various ditch surveys in the mines have also contributed their share to the common stock.

In what mode the State shall possess itself of this kind of information, and combine it all into an accurate general map o tate, in manuscript, and

not in print, is what the Committee propose briefly to consider."

Report of the State Surveyor General dated January 7, 1856, printed as Assembly Document No. 5 (Session of 1856), as an appendix to the Annual Report of the State Comptroller, contains the following item:

"I have had occasion previously to remark, p. 45 that the official map of California is comparatively worthless, in consequence of its great inaccuracy, and to recommend certain measures by which a better one might be obtained. To discuss the necessity of having an accurate map of the State, would be to insult the understanding of every intelligent man. I have therefore considered it a self-evident proposition. Under the head of 'County Roads,' and of 'County Boundaries,' may be found some suggestions concerning a State Map.

I would repeat the recommendation, that Railroad and Wagon Road Companies be required to send to this office maps of their respective roads, made on such scale as the Surveyor-General may designate, which shall exhibit accurately the topography of the adjoining country. For some valuable remarks upon a State Map, I would respectfully refer to the Report of Hon. Sherman Day, Chairman of the Senate Committee on Public Lands, of the last session, Doc. No. 17, App. to Senate Journal. I would also refer to remarks upon the same subject by Chas. H. Poole, County Surveyor of San Diego County, in his valuable Report of this year, which may be found in Appendix D."

* * * * * * * *

The report of Chas. H. Poole, County Surveyor of San Diego County above referred to and attached as an appendix to the Annual Report of the State Comptroller contains the following item:

"I have no hesitation in saying that
p. 237-8 the map of the State of California, approved and declared to be official by Act of the Legislature, whatever may be its reputation for accuracy in the northern counties, is most lame and impotent in its delineations of the topography of this part of the State. Places are given upon the map that are new to our eldest residents, and fabulous localities are bestowed upon us gratis, and furnished 'officially' with a local habitation and a name. Roads are laid down thereupon, over districts which never have been, and in all human probability never will be, trod by mortal man, and old and well-known points are either stricken out of existence, or baptized with new and unheard of appellations. The number of rivers in the county is not far from correct, but their locations and courses do violence to all notions of topographical propriety. The faint shadowings of mountains over some portions of the district, hardly gives us a complete idea of their extensive proportions, nor does the vast and important region known as the desert, seem to have been considered worthy of even a name. The road to Fort Yuma is very conveniently located on the map, being a great improvement over the one upon the ground, and the numerous wells placed adjacent thereto by our ingenious geographers, must afford a grateful solace

to the thankful and thirsty traveler, should he ever succeed in finding them.

Plainly and seriously, this map as far as it relates to this section of the State, is a sham and an imposture, altogether as disgraceful to the authority which indorsed it, as to its makers or compilers. A crude and ill-digested performance like this, conducted with parsimony and executed in haste, cannot fail to bring reproach upon the profession, as it has already wronged the public who authorized its publication.

A map worthy of California, and entitled to respect as competent authority, never could have been constructed in the short space of time allotted to the one under consideration, even with a large and able corps of surveyors, observers and assistants, and liberal financial aid from the State—none of which advantages I suppose that enterprise to have enjoyed.

No reliable map of the State can be produced, I think, unless liberal appropriations are made to carry on the undertaking, in order that the services of skillful and experienced practitioners can be secured for a term of years, the longer the better, so as to determine with the utmost accuracy, by astronomical and trigonometrical measurement, the exact position of every important point. The only system by which this can be accomplished, is that of covering the entire area with a net-work of triangles, and this we know is a work of patient and extended labor, and by no means a matter of speedy accomplishment.

Those States and foreign countries which have hitherto engaged in such surveys, have acted in accordance with similar views, and few of their surveys are yet completed, their publications being generally confined to detached and important localities. The 'ordnance survey' of England and Ireland is still in active prosecution, and although it has been forty years in progress, it is not yet complete as a whole. The survey of France, commenced some sixty years since, has not been published, nor is our national coast-survey much more than commenced, though it has been conducted with energy and expedition, with every assistance the Government could furnish, for twenty-three years. The State surveys of New York, Massachusetts, and several other states, were from eight to fifteen years in progress, under exceedingly liberal auspices, before any results were published, and these were even declared unsatisfactory by their compilers, owing to the brief time allowed for their completion.

With the plain history of similar undertakings before us, and the light of their experience as a guide, it would be unwise for us to expect the production of a correct and finished map, before time and means had been provided to perfect a thorough and minute survey. The Publication of a worthless, because inaccurate map, works harm in more ways than one, and not the least is the discredit it throws upon a profession claiming some hard-working and deserving members.

Private enterprise can furnish all the crude and cheap maps that are wanted for ornament and show, and are demanded by those for whom such things are sufficient, but an enlightened community, and an age of intelligence requires a high degree of perfection in a public work like this, susceptible in all its details, of the most rigid demonstrative accuracy.

I have the honor to be with high respect,

Your most obedient servant,

CHARLES H. POOLE,

Surveyor San Diego County."

The Annual Report of the State Surveyor General dated January 12, 1857, and printed as an appendix to the Senate Journal (8th session), contains the following item:

VI. STATE MAP.

"The existing official map of the State is
p. 23-4 a broad burlesque upon the topography of California. No mortal foot has ever trodden over roads delineated upon it, and the directions of mountain chains and river courses, as there laid down, are most admirably calculated to answer the purpose of an ignis-fatuus to delude the benighted traveler, who should ever trust to their guidance. Lakes are placed where the thirsty soil rarely sucks a drop of water, and fertile plains appear where only barren deserts stretch their broad expanse. It is a disgrace and a reproach to the State and should be replaced at once by a map conforming to

the true character of the country. By private means a mass of valuable geographical information has been collected, and from the various sources of which it is easy for the State to avail herself, a map, correct in detail, with a true delineation of county lines, river courses, mountain ranges, roads, mining canals, positions of towns, &c., can be collated at a comparatively small expense. Such a map made in the original, upon a scale admitting of additions, as from time to time increased geographical knowledge will render necessary, should be on file in the Surveyor General's Office, from which, if ever deemed necessary, publications could be made. An official map is supposed to be final evidence of county boundaries, and other geographical and topographical truths by which the State or county interests can be affected—in the determination of election contests, for example, where the returns from a single princt (as has been the case) may decide for or against the right to his seat of a Senator or an Assemblyman. The State should possess a correct map in the original, and not be at the mercy of any unauthorized publication. But such an undertaking, if begun, should be upon a scale of expenditure and performance worthy of the State and the value of the work. From time to time, subsequent Legislatures can appropriate sums for the prosecution of the labor on the map to its completion. In New York, Massachusetts, Pennsylvania, and other States, years of labor have been bestowed upon similar works, and it behooves Cali-

fornia, who has a greater immediate interest in the development of truthful and reliable information concerning the topography of her territory, to take prompt and effective measures to secure the commencement of a correct State map. I would recommend the appropriation of $5,000 for that purpose."

Annual Report of the State Surveyor General dated January 7, 1858, printed as an appendix to Senate Journal (9th session), contains the following item:

STATE MAP.

"The remarks on this subject, in my last p. 16 annual report, are of the same force now as they were then. The need of a correct map is even greater now than then. The so-called official map of California, by Eddy, is still acknowledged. No other state has enjoyed equal advantages with California, for improvement in this respect, and in no other state would a correct knowledge of the topography of the country be of such public utility. We are far behind the rest of the Union in these matters, and I urgently request that so important a subject may meet the notice it deserves."

Mr. PECKHAM: Government rests. [310]

DEFENDANTS' EVIDENCE.

Mr. KELBY: If your Honor please, the motions that we are about to present are those which are addressed to the Bill of the plaintiff, and which are made pursuant to the defendant's reserved objec-

tions. The first one is a motion to strike, and if it please the Court, as I direct it to a particular allegation of the complaint, will the Court rule on the matters one by one?

The COURT: Have you a written motion similar to the one you are now reading?

Mr. KELBY: No, I have not.

The COURT: Are you prepared to offer evidence in this case?

Mr. KELBY: Yes, your Honor.

The COURT: Why not file your objections in writing, and let the Court reserve its decision and proceed with the introduction of your evidence?

Mr. KELBY: I am perfectly willing to take the ruling of the Court.

The COURT: Don't you think that would expedite the matter?

Mr. KELBY: I am willing to co-operate to the fullest extent, because I am a time-saver, myself.

The defendants offer in evidence Defendant's Exhibit 13, which is a plat of township No. 3 north, range 4 west, Mount Diablo Base Meridian, it being a photostatic copy of a map certified by John Plover, the United States Surveyor General for California, and which is a map referred to in the answer.

Mr. PECKHAM: To which we object, if your Honor please, on the ground that it does not appear that that is an approved and accepted township plat of the land that it purports to describe. It is a de facto survey, and is without proof that it is an

approved and accepted plat. We will object to its admission.

The COURT: What plat was that?

Mr. KELBY: That was the plat that was made and approved, I [311] think, on March 4, 1863.

The COURT. Objection overruled; an exception.

Mr. PECKHAM: May I point out to the Court that that is not the map of 1863, but is a Joy survey made in 1923. We object to it further that it does not appear to be complete, that there are cuttings-out that I think this Court and we are entitled to see. We object to it because it appears on its face to be defaced, and appears to have eliminated from it portions of the map which may or may not be relevant to the inquiry here.

The COURT: Cannot we obtain a copy that has not been cut in any way, Mr. Kelby?

Mr. KELBY: This map is, as I find it, your Honor.

The COURT: This was a portion of the Joy map that was eliminated is that right?

Mr. PECKHAM: That is it, it was eliminated by the Commissioner of the General Land Office.

The COURT: I wish, Mr. Kelby, if objection is made that this exhibit has been mutilated, that you present a copy *of the* of the plat that has not been mutilated or cut in any way.

Mr. KELBY: All I can say is that it has not been mutilated by me.

The COURT: I should like to have a copy of that plat before me.

Mr. KELBY: Yes, I will see if I have one anywhere else.

The COURT: Very well.

Mr. PECKHAM: For the record, may I interpose the further objection to the last exhibit that it is a purported sectionizing survey by the General Land Office of land within the limits of land reserved by the President from entry, and committed to the Navy Department, and over which the Land Office had no power to make a survey. Your Honor's ruling will be the same?

The COURT: You are offering it now? [312]

Mr. KELBY: Now I offer the same map.

The COURT: You stated that that map was made in 1863. You mean in 1923?

Mr. KELBY: This is certified as of October 24, 1923, and purports to be a survey by Francis E. Joy, United States Cadastral Engineer, and dated apparently January 27, 1921, and refers to a supplemental map of September 27, 1923, so I think that I shall have to eliminate what I said in respect to its having been a map or plat approved in 1863, and amend that by stating that it is a map of a survey completed October 10, 1923.

The Court: The objections are overruled and an exception. It may be admitted.

(The map is marked "Defendant's Exhibit 13.")

Mr. KELBY: Defendants offer in evidence a map of Township No. 3 north, range 4 west, M. D. M., approved March 4, 1863, by the United States Surveyor General of California.

Mr. PECKHAM: If your Honor please, for the benefit of the record, may we make the objection to this map, that as to Township 3 north, range 4 west, the map is original only of surveyed lines and the United States Surveyor General has, at a previous hearing of this case, testified that the lines as shown on Mare Island on the west side of Mare Island Straits were not survey lines, they are mere sketched lines.

The COURT: Overruled, an exception.

(The document was received in evidence as "Defendants' Exhibit 141".)

Mr. KELBY: We offer in evidence plat of township 4 north, range 4 west, Mount Diablo Meridian, which appears to be certified as of March 4, 1863.

Mr. PECKHAM: If your Honor please, to this map we object, it does not appear that the land embraced within the confines of this map is any part of Swamp and Overflow Lands 34, or any part of the [313] land covered by the patent sought to be cancelled in this proceeding.

The COURT: What do you say to that?

Mr. KELBY: I say, your Honor, that we shall require this map for purposes that we have thus far not alluded to, and that is that these two bodies of land were one, Island No. 1.

The COURT: Overruled; an exception.

Mr. PECKHAM: May we add to that objection that this purports to be a survey by the Land Office of lands within the confines of a military reservation committed to another department of the Government, to-wit: the Navy Department?

The COURT: Objection overruled; an exception.

(The map was marked "Defendant's Exhibit 15".)

Mr. KELBY: Yes.

Mr. PECKHAM: Objected to as immaterial, irrelevant, and incompetent. Generally this covers lands not within the confines of the patent that we are seeking to cancel, except it purports to patent land within the confines of a Government Reservation, and beyond the power of the Land Office.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 16".)

Mr. KELBY: Defendants offer in evidence a certified copy of an excerpt from the History of Solano and Napa Counties, California.

Mr. PECKHAM: May we interpose the objection to that that in so far as it seeks to affect the title to this property, or the issues in controversy in this case, it is immaterial, irrelevant, and incompetent?

The COURT: I suppose it is offered for the same purpose you offered portions of the history.

Mr. PECKHAM: It is from the same book, but I offered it to show the life of Sawyer from a frontispiece signed by Sawyer.

The COURT: Overruled; an exception. [314]

(The document was marged "Defendant's Exhibit 17".)

Mr. KELBY: Defendants offer in evidence a certified copy of the stipulation in the case of Bouldin, et al., v. Phelps, et al., for the purpose

of showing, if your Honor please, that the United States of America was represented in that cause by A. L. Rhodes, Special Counsel for the United States, who signed the stipulation.

Mr. PECKHAM: If your Honor please, we will have to object to that as immaterial, irrelevant, and incompetent. I will say this, I will stipulate to the fact that Judge Rhodes represented the Government in that case; of course he did, the records show it.

Mr. KELBY: I will take Counsel's stipulation, your Honor.

(The document is marked "Defendant's Exhibit 18".)

Defendants offer in evidence a certified copy of pages 315, 316, 317, and 318, California Field Notes, Volume 396, of which this is alleged to be a true exemplification.

Mr. PECKHAM: If your Honor please, we object to that on the ground that in so far as it purports to be field notes of a survey of Swamp and Overflow Land 34, it is an attempt by the Land Office to survey land in the exclusive possession, custody, and control of the Navy Department under presidential reservation, and the Land Office's authority was terminated.

The COURT: Overruled; an exception.

Mr. PECKHAM: On the further ground it is immaterial, irrelevant, and incompetent.

The COURT: The same ruling.

(The document was marked "Defendant's Exhibit 19".)

Mr. KELBY: Defendant's offer in evidence a list, No. 208, being a list of Swamp and Overflow land selected as inuring to the State of California under the provisions of the Acts of Congress approved September 28, 1850, and July 23, 1866, in the district lands subject to sale in San Francisco, embracing 13,817.44 acres, which list is duly certified by W. S. Kingsbury, Chief of the Division [315] and ex-officio Register of State Lands.

Mr. PECKHAM: We make objections as immaterial, irrelevant, and incompetent.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 20".)

Mr. KELBY: We offer in evidence a duly certified copy of Patent No. 214 and No. 937,055 Swamp Land in the San Francisco District, California.

Mr. PECKHAM: If your Honor please, we object to this as immaterial, irrelevant, and incompetent to the extent that it attempts to vary—and may the record show that this objection is also made to the last preceding exhibit, it is an attempt to vary the Patent that we have introduced, made to the State of California by the Government, covering the very land, Swamp and Overflow 34; we further object to this and the preceding document that the Darlington Survey could not be modified in any such manner as this.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 21".)

Mr. KELBY: We offer in evidence a copy of that portion of page 64 of Swamp and Overflow Lands Register pertaining to Swamp and Overflowed Lands Survey No. 569, Solano County, California, duly certified by W. S. Kingsbury, Chief of the Division, and ex-officio Register of State Lands.

Mr. PECKHAM: To which we object as immaterial, irrelevant, and incompetent, and an attempt to vary the Darlington Patent issued by the State of California, and a survey made by Wade-Hemicourt in support of the Darlington patent, and that it is immaterial, irrelevant, and incompetent, the patent speaks for itself.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 22".)

Mr. KELBY: We offer in evidence a copy duly certified of the record of patent issued April 7, 1874, to John W. Pearson, for lands [316] described in Swamp and Overflowed Lands Survey 569, Solano County.

Mr. PECKHAM: To which we object on the ground that 569 has nothing to do with this suit, it is a suit to cancel a patent on Swamp and Overflow 34.

The COURT: Overruled; an exception.

Mr. PECKHAM: On the further ground that nothing that the State of California can do can affect the interest of the United States in any manner.

The COURT: The same ruling; an exception.

(The document was marked "Defendant's Exhibit 23".)

Mr. KELBY: Defendants offer in evidence a duly certified copy of communications between the State of California and the Interior Department of the United States, pertaining to townships 3 and 4 North, which are dated October 18, 1912, February 12, 1913, November 12, 1914, July 29, 1912, November 17, 1914, December 4, 1914, April 17, 1915, April 22, 1915, March 6, 1923, March 22, 1923.

Mr. PECKHAM: If your Honor please, for the purpose of the record may we object to the introduction on the ground that they are immaterial, irrelevant, and incompetent, purporting to be communications with respect to a proceeding in the Land Office to effect the determination of Swamp and Overflowed Lands, and, as far as the Land Office is concerned, that these proceedings have all been merged in the issuance of the patent?

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 24".)

Mr. KELBY. Defendants offer in evidence a list of Swamp and Overflowed Lands in California, being list 838, certified by Louis W. Reilly, Examiner, and approved by G. B. Driesbock, Chief of Division G, and by the Commissioner of the Land Office, with the determination of the Commissioner of the General Land Office thereon, and approval of the First Assistant Secretary, dated January 30

and March 12, 1924, relating to patent No. 937,055, April 26, 1924. [317]

Mr. PECKHAM. For the record, we object to that on the ground it is immaterial, irrelevant, and incompetent, that the lands therein purported to be listed to the State were public lands of the United States, but were within the confines of a military reservation covered by a Spanish Grant at the time of the Swamp and Overflowed Act to which the decision purports to refer, and that the Land Office had no authority whatsoever to make the decision.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 25".)

Mr. KELBY. We offer in evidence a map, a photostat, of Township 3 North, Range 4 West, Mount Diablo Meridian, certified by E. F. Beale, United States Surveyor General, and also bearing the certificate under date of July 24, 1907, of Mr. Fred Dennett, Acting Recorder of the General Land Office, to the effect that this is a copy of the plat of official survey of the lands to which it relates, on file in this office.

Mr. PECKHAM. We will have to object, I can appreciate Counsel's position, but that precise exhibit was the one to which Surveyor General Barker testified at the previous hearing in this case, and he pointed out that that line of Mare Island, as shown on that map, was a mere sketch and not a surveyed line, and with that comment I have no objection to the map going in.

(Defendant's Exhibit 12 for identification is marked in evidence as "Defendant's Exhibit 12".)

Mr. KELBY. We offer in evidence map of township 4 north, range 5 west, Mount Diablo Meridian, California, exclusive of the writing found on the back of this exhibit.

Mr. PECKHAM. With the understanding that it is offered exclusive of the writing on the back, I have only the objection for the record that it is immaterial, irrelevant, and incompetent.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 26".) [318]

Mr. KELBY. Defendants offer in evidence a map, a sketch, and field notes of survey relating to the Darlington Survey, so-called, and purporting to have been made by the County Surveyor of Solano County, on the 10th of October, 1866, David P. Wade, County Surveyor.

Mr. PECKHAM. We make the same objection to that as immaterial, irrelevant, and incompetent.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 27".)

Mr. KELBY. We offer in evidence a map of Mare Island Straits, California, from a trigonometrical survey under the direction of Adbache, Superintendent of the Survey of the Coast of the United States, triangulation by R. D. Cutts, Assistant, topography by R. D. Cutts, Assistant, and A. F. Rodgers, Sub-Assistant, hydrography by the party under the command of Commander James Alden,

U. S. N., Assistant, exclusive of the writing found on the back of it.

Mr. PECKHAM. Exclusive of the writing found on the back we have no objection to its going in. We have already introduced it as one of our Government's Exhibits.

(The document was marked "Defendant's Exhibit 28".)

Mr. KELBY. We offer in evidence a chart entitled "California, Mare Island Quadrangle, Department of the Interior, U. S. Geological Survey, Edition of 1916, Reprinted 1927, Polyconic Projection, North American Datum.

Mr. PECKHAM. To this, if your Honor please, we have no objection to show the configuration of the coast, but we do object to the applied name upon it, Island No. 1, as no part of the duty of the Geological Survey, and because it appears to have been first made in 1916, after the reclamation of the portion of Mare Island labeled here as Island No. 1.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 29".)

Mr. KELBY. With respect to these motions which you original- [319] ly permitted me to file, shall I file those in the Clerk's Office?

The COURT: Yes.

Mr. PECKHAM. If your Honor please, counsel requested records from Mare Island on dredging and filling. I have data which will show the amount of the fill put in prior to 1906. It measured 49,000 yards of material.

Mr. KELBY. That is up to 1906?

Mr. PECKHAM. Yes. Since that time I think Captain Carlson illustrated on this map, here, up to 1906 this had been filled and some 49,000 yards of material put on it. Up to 1917 this line YY was filled, and in 1931 the line XX was filled on this big chart. The quantities, yardage and depth have never been kept because it was simply a by-product of the dredging of the channel.

Mr. KELBY. I am now going to ask Counsel to stipulate that whatever interest David N. Darlington had in the land covered by the California patent to him dated March 18, 1857, has passed by mesne conveyance to the defendants herein, and that the defendants hold such interest as tenants-in-common in the undivided proportions as follows:

Edmund Burke, 3/100, James E. O'Donnell, 30/100, Walter E. Burke, as Trustee for Villa M. Behan, 27/100, Fletcher M. Slosson, Frances Morse, and Ellinor Caroline Whitman, jointly, 40/100.

Mr. PECKHAM. So stipulated.

Mr. KELBY. There are other objections as to the introduction of evidence at the last trial, last session; shall I also make that the subject of a written motion?

The COURT. If you will.

Thereupon the case was submitted on briefs to be filed 40, 30, and 20. [320]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed that the foregoing statement of evidence is a correct copy of the condensed trial record with the testimony stated in narrative form.

Dated: May 7th, 1934.

H. H. McPIKE,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant U. S. Attorney.
Attorney for Complainant.

JAMES E. KELBY,
GORDON LAWSON and,
SAMUEL M. GARROWAY,
By JAMES E. KELBY,
Attorneys for Defendants.

The foregoing statement of evidence, consisting of 141 pages, is hereby approved.

Dated: May 7, 1934.

THE COURT,
By A. F. ST. SURE,
Judge.

[Endorsed]: Filed May 7, 1934. [321]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the above named plaintiff and to its attorneys:

The above named defendants, conceiving themselves aggrieved by the final decree entered herein

on or about the 17th day of January, 1934, in favor of plaintiff and against these defendants, hereby respectfully appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and pray that a citation be issued as provided by law to the above named plaintiff, commanding it to appear before said Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises; that a transcript of the pleadings, proceedings, testimony, exhibits, and orders, filed in this cause on which said decree was entered, duly authenticated by the clerk of the Court, be submitted to the United States Circuit Court of Appeals for the Ninth Circuit under the rules in such cases made and provided. [322]

Dated: Los Angeles, California, this ..... day of April, 1934.

James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Villa M. Behan, formerly Villa M. Burke, substituted in the place and stead of Walter E. Burke, as administrator of the Estate of Edmund Burke, deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper

person in the place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke,

By JAMES E. KELBY
GORDON LAWSON
SAMUEL M. GARROWAY
Solicitors for said Defendants.

[Endorsed]: Service of the within Notice of Appeal by copy admitted this 10th day of April 1934.

H. H. McPIKE
Attorney for.....

Filed Apr. 10, 1934. [323]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the defendants, James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Villa M. Behan, formerly Villa M. Burke, substituted in the place and stead of Walter E. Burke, as Administrator of the Estate of Edmund Burke, deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper person in the place and stead of Walter E. Burke, as Trustee for Villa M. Behan, formerly Villa M. Burke, and make the following assignment of errors

upon which they will rely upon their prosecution in the above entitled cause of an appeal from the final decree made by this Honorable Court and entered herein on or about January 17, 1934:

(Note: Hereinafter when reference is made to "the property," it will refer to that portion of the property described in plaintiff's complaint as certain swamp and overflow land, Survey No. 34, containing 164.55 acres, and designated as a fractional portion of the south one-half of the southeast quarter of Section 10, the northeast fractional portion of the northeast quarter of Section 15, the southwest fractional portion of the northwest quarter of Section 14, and the northeast fractional portion of the southwest quarter of Section 14, Township 3 North, Range 4 West, M. D. B. & M.) [324]

I.

The Court erred in holding that complainant, UNITED STATES OF AMERICA, is the owner of and since the year 1853 has occupied as part of the Mare Island Navy Yard reservation for public, to-wit: military and naval purposes, and has been in possession of "the property".

II.

The Court erred in holding that the subdivisional descriptions, designated as "the property", are null and void and that no such tracts or parcels or pieces of land exist, or are delineated, or shown upon any approved and accepted United States public land survey, may, or plat.

III.

The Court erred in holding that a grant of Mare Island, including and embracing "the property", was duly made by the Government of Mexico to one Victor Castro by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California; that a decree was duly given, made, and entered by the Board of Land Commissioners, confirming to the petitioners, George W. P. Bissell and William H. Aspinwall, their right and title in and to "the property".

IV.

The Court erred in holding that the Board of Land Commissioners was vested with power and authority to make such confirmation by the Act of Congress, approved March 3, 1851, (9 stat. 631) and that the claims of the petitioners, Bissell and Aspinwall, to "the property" were under right and title derived from the Mexican Government.

V.

The Court erred in holding that the District Court of the United States, for the District of California, duly gave and made its order for judgment in said cause, confirming the grant and the decision of the Board of Land Commissioners; and in finding that [325] the said District Court duly gave and made its judgment and decree confirming said decree of said Land Board, and directing the entry of said decree nunc pro tunc as of the 2d day of March, 1857.

VI.

The Court erred in holding that the defendants, hereinabove named, are remote claimants under, successors to, and in privity with the United States, in respect to the claim to "the property", filed with and alleged to be confirmed by said Land Board.

VII.

The Court erred in holding that the survey of "the property", made by the Surveyor General of California in July 1877, was thereafter approved by the Commissioner of the General Land Office and that he caused the same to be filed in a jacket called "The Mare Island Jacket", in the file of the Military Reservations in the General Land Office; and that on September 22, 1905, the Commissioner of the General Land Office expressly approved, used, and acted on said survey; and on September 28, 1905, the Secretary of the Interior expressly approved and concurred in the action of the Commissioner of the General Land Office and approved, used, and acted on said survey and plat.

VIII.

The Court erred in holding that on February 9, 1853, the Secretary of the Navy of the United States, acting under and in pursuance of Section 3 of the Act of August 31, 1852 (10 Stats. 104), duly selected the property as a site for a Navy Yard and Naval Depot, provided for by said Act of Congress, and that, following said selection, the Secretary of the Navy, on February 9, 1853, recommended to the President of the United States that the property

be reserved for public use and that on February 11, 1853, President Millard Fillmore duly approved said recommendation and made a reservation covering "the property"; and that said reservation was communicated to the Secretary of the Interior and properly recorded, and [326] that from time to time the Congress of the United States duly approved, ratified, and confirmed said reservation covering "the property", and by various statutes appropriated large sums to improve "the property" and authorized its improvement.

IX.

The Court erred in holding that "the property" is a part of the lands and premises described and conveyed by the grant of Juan B. Alvarado, Governor of California, under the rule and occupancy of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court; and that the property included in the description of the lands described in Paragraph II of the Bill of Complaint are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor, Mary S. McArthur.

X.

The Court erred in holding that ever since February 16, 1853, the United States has occupied "the property" by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval

Station, Navy Yard, and premises of complainant situated thereon, and that the possession of the United States of "the property" has at all times been actual, open, adverse, and exclusive and under claim of right and absolute ownership in fee of "the property", and under the title and color and claim of title supplied by said reservations and the deed of January 4, 1853, and the decision of the Board of Land Commissioners of May 8, 1853, and the order of the District Court of the United States, for the District of California, duly given and made March 2, 1857, and the decree of April 15, 1930.

XI.

The Court erred in holding that the claim or claims of these defendants in and to the property is wholly without right or foundation in law or in fact, and that the nature of these defendants' [327] claims appearing in their answers are wholly without right.

XII.

The Court erred in holding that the patent dated March 9, 1928, to the State of California of "the property" is null and void and is without force and effect and has no validity, for the reason that the lands described in said patent were claimed and held in private ownership from the Government of Mexico at the time of the passage and approval of the Act on September 28, 1850 (9 Stats. 519), commonly known as the "Swamp Land Act", and was not a part, and never had been a part, of the public domain of the United States, or been opened

by entry to private persons or subject to the aforesaid Swamp Land Grant, but had, at all times since the date of the Mexican Grant to Victor Castro, been owned and occupied by complainant, as predecessor, and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that the property had been selected for and devoted to the necessary public purposes of the United States and withdrawn from entry by private persons, as alleged in Paragraphs VI and VII of plaintiff's Bill of Complaint, long prior to the issuance of the patent to the State of California, and while the legal title in and to said lands was vested in the United States of America, and for the further reason that said patent was not issued pursuant to the judgment, discretion, determination, or power of said Hubert Work, as Secretary of the Interior, or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officials, or either of them, or of the President of the United States, which said officials are by law charged with the responsibility of caring for, protecting, disposing of, and awarding patents for or other evidences of title to the public domain and any part thereof; and for the further reason that the descriptions of the patent are null and void and designate no tracts or parcels of land shown or delin- [328] eated on any approved and accepted map or plat.

XIII.

The Court erred in holding that the only final, recognized, approved and accepted United States

public land map, or plat of that portion of Mare Island contained within fractional Township 3 North, Range 4 West, M. D. B. & M., and showing tracts and parcels of land therein and controlling all descriptions of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and accepted in 1923, a true reproduction of which is attached to plaintiff's Bill of Complaint and marked "Exhibit J".

XIV.

The Court erred in holding that complainant is without adequate remedy in the premises at law.

XV.

The Court erred in holding that it is not true that these defendants, or either or any of them, are the owners of or entitled to the possession, as tenants in common, or otherwise, as alleged in the joint answers of the above named defendants to the complaint as amended, of "the property".

XVI.

The Court erred in holding that it is untrue that the grant of Mare Island, by Juan B. Alvarado to Victor Castro, dated May 20, 1841, is void on its face, because it purports to grant an interdicted island, or that said grant was or is a forgery, or that plaintiff knew that it was such when plaintiff's Bill of Complaint was filed; and in holding that it is not true that the decree of confirmation by the United States Land Commission is void on its face.

XVII.

The Court erred in holding that it is untrue that the proceeding to confirm the said grant of Mare Island to said Castro and his mesne successors had terminated on June 4, 1853, by their conveyance of said premises to plaintiff or plaintiff's acceptance of the same; and in holding that it is untrue that said grant did not include any portion of [329] the premises sought to be described, delineated and depicted in State Segregation Surveys Nos. 34 or 569, or either of them, or any land north of a line drawn from Station 54 to Station 138, as depicted in Freeman's Survey of 1877.

XVIII.

The Court erred in holding that it is not true that the appeal of the United States from the decree of confirmation was, or that any of the proceedings had therein were, null or void on their face, or otherwise.

XIX.

The Court erred in holding that it is not true that the nunc pro tunc decree of confirmation, entered in the above entitled Court in said proceedings, is null and void on its face, or otherwise.

XX.

The Court erred in holding that it is not true that the conveyance of Bissell, Aspinwall and McArthur to the United States, dated June 4, 1853, is null or void on its face, or otherwise.

XXI.

The Court erred in holding that it is not true that the order of the President, dated November 6, 1850, reserving Mare Island for public use, is null or void on its face, or otherwise.

XXII.

The Court erred in holding that it is not true that the order of the President, dated February 9, 1853, reserving Mare Island with all of its appendages of tule or marsh, ordinarily reported to belong to Mare Island, is null or void on its face, or otherwise.

XXIII.

The Court erred in holding that it is not true that the premises described in Paragraph II of plaintiff's complaint are a part of any Island No. 1, embraced in said Survey No. 34 or No. 569, as depicted on the official maps of plaintiff, copies of which, marked, respectively, "A" and "B", are attached to the joint answers [330] of defendants, filed March 31, 1931, and therein referred to and incorporated, or as reported or depicted in any approved survey and plat of Township 4 North, Range 4 West, M. D. B. & M., accepted November 8, 1923, were on September 28, 1850, or at any time, or at all, ever a part of the public domain of the United States, or swamp or overflowed lands embraced in Swamp and Overflowed Land Grant to California at that time.

XXIV.

The Court erred in holding that it is not true that "the property" is not within the exterior boundaries of Mare Island and is north of the northern boundary of Mare Island, as established officially by United States Surveyor General Wagner, or anyone within his jurisdiction to so establish, and in holding that "Exhibit M" attached to and made a part of the joint answers of these defendants, March 31, 1931, was neither a decision nor within the jurisdiction of United States Surveyor General Wagner and that Surveyor General Wagner had no power to alter or modify said Survey of Freeman.

XXV.

The Court erred in holding that it is not true that the improvements made by plaintiff on "the property" were made as a trespasser upon said premises or were without claim or right or color of title and that the same were made without and against the consent and adversely to the claims of defendants and their predecessors in title; that it is not true that plaintiff is without right or equity in the premises, or is proceeding, or ever did proceed as a trespasser or by force of arms.

XXVI.

The Court erred in holding that it is not true that statements in the patent to the State of California "that the lands therein described were unsurveyed at the time of the issuance of said patent" are untrue, or was and is an error of law, which is

refuted by any record on which said patent is based. [331]

XVII.

The Court erred in holding that it is not true that defendants have an interest in the premises sued for as tenants in common with others, as the record discloses or otherwise, or that as such co-tenants, they are entitled to the possession of said premises under any mesne conveyance from the State of California, as successors of plaintiff, or otherwise, extending to defendants under the Swamp and Overflowed Land Grant to California, of September 28, 1850, or under any other grant.

XXVIII.

The Court erred in holding that it is not true that the patent of the United States, with its recitals, or descriptions, or otherwise, issued to California March 9, 1928, determined the land was part of the public domain on September 28, 1850, and/or was not included in the grant to Castro.

XXIX.

The Court erred in holding that it is not true that the lands described in said Surveys No. 34 and No. 569 were included in Swamp Land Grant of September 28, 1850.

XXX.

The Court erred in holding that about September 16, 1914, California applied to the Commissioner of the General Land Office for certification to it of

lands falsely claimed by it to be indefinitely represented as swamp and overflowed on certain plats approved March 4, 1863, pursuant to R. S. Sec. 2488; that lines on said plats claimed to refer to "the property" in controversy were not survey lines but were merely drawn in; that the application of California was correctly rejected by the Commissioner of the General Land Office, on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in R. S. Sec. 2488, or "furnish information indicating that any particular part, great or less, of the lands claimed were [332] wet and unfit for cultivation."

XXXI.

The Court erred in holding that Exhibits "A", "B", and "H", attached to the answers of these defendants, do not depict Mare Island and "Island No. 1" as separate tracts of land or separate islands, but do depict them within a continuous mean high water line, including both "Island No. 1", so-called, and "the property"; that "Island No. 1", as depicted on said charts, is a local place name of recent application and that "the property" would fall partly on "Island No. 1", as designated on said charts; that each of said charts depicts "Island No. 1" and Mare Island as separate tracts of firm land, though not as separate islands; that it is no part of the duties or powers of the persons making said maps to impose local place names on said maps or charts.

XXXII.

The Court erred in holding that it is not true that the imposing on Exhibit "E", annexed to and made a part of the answer of these defendants, of the delimitation of the premises, purported to have been reserved for public use by the said Presidential Orders by the Secretary of the Interior, was a null or void act or that either of said orders was void on its face, and/or without legal effect; that it is true that said act of the Secretary of the Interior could not limit the rights of the United States to lands outside of the area so delineated; that it is not true that at the time of the making of said orders the equitable title to the property had passed under any grant in praesenti, or otherwise, to the State of California under Swamp and Overflowed Land Grant of September 28, 1850, or any other grant, nor was said grant a contract between the United States and California, which inured to the benefit of the answering defendants and/or their co-defendants, as their interests might appear, nor was the President of the United States without authority in law to make either of said executive orders. [333]

XXXIII.

The Court erred in holding that it is not true that Exhibit "A", annexed to plaintiff's Bill of Complaint, is not a copy of the grant to Castro, nor was said purported grant a forgery.

XXXIV.

The court erred in holding that it is not true that said alleged grant was never finally confirmed to said Victor Castro, or to his successors in interest; that it is not true that the area or boundaries embraced within the description contained in the alleged grant has never been determined or ascertained by survey thereof by the United States Surveyor General for California; that it is not true that it was surveyed by Freeman and the Freeman Survey was approved; that it is true that no patent thereof has issued to the confirmee or confirmees, pursuant to the Act of Congress of July 1, 1864, or otherwise, but that such patent is unnecessary, as being simply a confirmation by the United States to the United States, the transferee of the confirmees.

XXXV.

The Court erred in holding that it is not true that by reason of said decision by the Secretary of the Interior identifying "the property" as swamp, the said patent of David M. Darlington was confirmed as of the date of its issuance, pursuant to the provisions of the Act of July 23, 1866, or any Act, or that said confirmation has inured to any of the appearing defendants.

XXXVI.

The Court erred in holding that it is not true that by reason of the purchase of said premises by the United States, subsequent to September 28, 1850, any title or interest acquired by the United

States thereby has inured to any of the defendants or their co-tenants in common, or otherwise, or that plaintiff is estopped to assert the same against the defendants, or any of them, or that the same was or is subordinate in any particular to State Swamp and Overflowed Grant of September 28, 1850, or to any Federal Patent to California therefor. [334]

XXXVII.

The Court erred in holding that it is not true that the said claim of Victor Castro was not reserved by the Treaty of Guadalupe Hidalgo, or by statute of the United States on September 28, 1850; that it is not true that the claim of said Victor Castro was not sub judice on September 28, 1850, or prior thereto, or was subject to disposition otherwise by the United States on said date, or that plaintiff is estopped to deny the validity of its said grant; that it is not true that equitable title of California or any equitable title of these defendants, or any of them, is superior to the title of plaintiff.

XXXVIII.

The Court erred in holding that it is not true that the patent of the United States to California, by relation or otherwise, is of the date of September 28, 1850, or is superior to the decrees of confirmation or superior to said executive orders purporting to reserve said premises for the public use of plaintiff, or that plaintiff is estopped to deny the validity of the same; that it is true that the area of the premises conveyed to plaintiff by Bissell,

Aspinwall, and McArthur, January 4, 1853, was within the boundaries of the survey referred to in said conveyance and that said survey did include Island No. 1, so-called, as delineated on said charts, and the whole thereof, and included all parts of areas embraced in said Swamp and Overflow Survey No. 34 and some of the area embraced in said Swamp and Overflow Survey No. 569; that it is not true that the line depicted on Exhibit "N" as the line of the upland in 1852 was or is the northern boundary of Mare Island or the southern boundary of "the property", or that the northern line of Mare Island, as there depicted, is the Machine Shop depicted on said maps; that Exhibit "M" is not a copy of any decision of the United States Surveyor General for California, relating to the Freeman Survey; but the Freeman Survey was a closed transaction and was finally approved at the time Exhibit "M" was [335] written; that it is not true that a line drawn from Station 54 to Station 138 on the Freeman Survey constitutes the northern boundary of Mare Island or the southern boundary of "the property" or the southern boundary of any Island No. 1, there being no such island as distinct from Mare Island.

XXXIX.

The Court erred in holding that it is not true that plaintiff is estopped to contend in this suit that the Castro Grant was not void in law and not, in fact, a forgery.

XL.

The Court erred in holding that it is not true that in the said application of California for certification, Honorable Curtis D. Wilbur, Secretary of the Navy, disclaimed or abandoned the said executive orders of President Fillmore, reserving Mare Island, or that plaintiff is precluded in any wise from asserting now said executive orders, or any claim other than that of its alleged purchase of Mare Island.

XLI.

The Court erred in holding that it is not true that the Act of Congress, providing for the acquisition of a Navy Yard at Mare Island, made or constituted Caleb Cushing, Attorney General of the United States, a special or any tribunal to determine whether the swamp and overflowed portions of Mare Island, or the swamp and overflowed lands abutting said island, had passed to California under the Swamp and Overflowed Grant of September 28, 1850, or that any exercise of any such jurisdiction determined that such swamp and overflowed lands had passed to California, or that thereupon the plaintiff applied to California for a cession of the overflowed portions of Mare Island, or that on May 11, 1854, California granted any such application to the extent of ceding to plaintiff the swamp and overflowed lands on the easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine [336] Shop, and excluded thereby the said lands north of

said line running east and west and from Ships Channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, or that any such restriction, with its conditions, was accepted by the plaintiff, nor is plaintiff estopped to claim otherwise.

XLII.

The Court erred in holding that it is not true that in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint, it was determined finally that "the property" was part of the public domain on September 28, 1850.

XLIII.

The Court erred in holding that it is not true that the supervising authority of the Secretary of the Interior over public lands of the United States authorized him to issue any instructions or to take any steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether any of the lands in controversy claimed by California in its application for certification, including "the property", were swamp and overflowed lands on September 28, 1850, or that in the exercise of his lawful judgment and discretion he took the steps for such purpose as are detailed in Paragraph XII of the answer filed March 31, 1931; that it is true that save for the powers given the Interior Department by the Land Commission Act, as amended, "the property" has been under the exclusive jurisdiction of the Navy Department.

XLIV.

The Court erred in holding that it is not true that the decisions and records in the suits of San Francisco Savings Union v. Irwin, or Bouldin v. Phelps, are muniments of the title of these defendants or their co-tenants in title, or otherwise, in any controversy between any of said defendants or said co-tenants and the United States; that it is true that none of the facts established in [337] any of said suits are binding or conclusive on plaintiff herein.

XLV.

The Court erred in holding that it is not true that the Cession Act of the State of California of May 11, 1854, is binding on plaintiff as a restriction on plaintiff's claim to any part of the lands granted, held, or claimed by Victor Castro and his successors in interest, or any of them, conveyed to the United States, nor is claimant estopped from claiming title to "the property" or any swamp and overflowed lands in either of said townships or any other township falling on Mare Island as granted, conveyed, and confirmed as above set forth.

XLVI

The Court erred in holding that it is not true that no part of "the property" was on July 23, 1866 occupied by plaintiff or devoted to public use or was unfit for any public use, or that up to July 24, 1866, plaintiff had made no susbtantial improve-

ment or expenditures thereon, and that any alleged occupation of said premises was not open, notorious, and visible to the human eye.

XLVII.

The Court erred in holding that Exhibit "A", attached to the answer of defendants, is a Coast and Geodetic Survey in accordance with the Freeman Survey and binding on plaintiff only so far as it shows the configuration of the coast, and the meanders of the mean high tide line which is the same as the Freeman Survey.

XLVIII.

The Court erred in holding that it is not true that any portion of Mare Island was swamp and overflowed land or public domain of the United States on September 28, 1850, or was subject to the Swamp and Overflowed Grant on said date; that Mare Island passed to the ownership of California on her admission to the Union and was not subject to the reservation of the public use of the United States; [338] that the State of California never consented to the purchase or reservation of any portion of Mare Island, except the portion thereof described in said Cession Act; that the State of California was competent to limit, or was in fact limited by said Cession Act, to a possessing right for the period when Mare Island was occupied by the United States Navy as a Navy Yard or that any condition subsequent was accepted by the

United States or that Mare Island was not, and is not, accessible from any of its sides, owing to the swamp and overflowed lands or the tide lands lying between it and navigable waters.

XLIX.

The Court erred in holding that it is not true that any northern boundary of Mare Island or southern boundary of swamp and overflowed lands later established by State Segregation Swamp and Overflow Survey No. 34, or by any descriptions inserted in the Federal Patent to California, are depicted on Exhibit "P", referred to and incorporated in the answer filed March 31, 1931, or on any other survey by the Coast and Geological Surveys of the United States, or was adopted by the Board of Officers sent to California to select a site for a Navy Yard, or is a boundary survey of said area referred to in the Bissell conveyance to the United States; that it is not true that the lands marked in red lines on the plat of Township 4 North, Range 4 West, approved March 9, 1924 (Exhibit "F"), are any part of "No. 1", but it is true that they are a part of the lands covered by Swamp and Overflow Survey No. 569, all marked on said plat by the surveyor, but not approved by the Secretary of the Interior on the application of California for certification, as alleged in Paragraph XII of the answer of these defendants, March 31, 1931; that it is not true that Exhibit "K", referred to and incorporated in said answer or plaintiff's Exhibit "L-16"

in evidence, is the survey of the Board of Officers sent to California to select a site for a Navy Yard, nor is the only part conveyed and made a part of the said Mare Island by [339] Bissell, Aspinwall, and McArthur; that it is true that said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island; that the survey referred to in the conveyance by Bissell, Aspinwall and McArthur to the United States and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay; that it is not true that Exhibit "K" is the controlling description of the conveyance from Bissell, Aspinwall, and McArthur to the United States, nor that said survey follows the water's edge or the natural boundaries of Mare Island throughout their entire extent or embraces the entire area of Mare Island, or all of the lands that were granted to Victor Castro and by him conveyed to the predecessor in title of the United States; that it is not true that the Navy Yard plan, attached to said exhibit, also shows the area of Mare Island or the southerly line of "the property", nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

L.

The Court erred in holding that it is not true that the patent of the United States to California approved said State Surveys Nos. 34 and 569, or said

State patent to said Darlington; nor, on issuance of said patent to the State of California, did the fee simple title of the United States vest in California as of the date of September 28, 1850; that it is not true that all or any subsequent action on the part of the plaintiff since that time by purchase, as alleged in the Bill of Complaint, or by reservation for public use, is null and void.

LI.

The Court erred in holding that the patent to the State of California is subject to collateral attack by plaintiff in a suit to quiet title under the laws of the State of California and of the United States, and in an action to cancel surveys by its own land officers and the approved surveys of the State and its own patent [340] executed in connection with the subject matter of this suit and the alleged claim of Swamp and Overflowed Grant; that nothing done on March 9, 1928, by the United States, or any of its officers, approved or in any wise validated any of the acts done or performed by California and its grantees, or in respect to the lands in controversy.

LII.

The Court erred in holding that it is not true that James E. O'Donnell is the owner in title, or otherwise, with his co-defendants, of 30/100, or any interest, or otherwise; that it is not true that Walter E. Burke, as Trustee, or otherwise, is entitled, as tenant in common, or otherwise, to 27/100, or any

interest, undivided or otherwise; that it is not true that the Estate of Edmund Burke is entitled to the possession of an interest in common, or otherwise, of 3/100, or any interest, undivided or otherwise; none of the defendants, Flethcer M. Slosson, Frances Morse, Eleanor Caroline Whitman, are entitled to 40/100 undivided interest, or any interest, in common or otherwise; none of the defendants are entitled to any interest, in common or otherwise, in the premises in controversy.

LIII.

The Court erred in holding that it is not true that the patent of the United States, issued March 9, 1928, was duly issued in the absence of fraud, imposition, and/or mistake, but that it is true that said patent was issued under a mistake as to the power of the Land Office and a mistaken supposition that the land in controversy was public domain of the United States on September 28, 1850; that it is not true that the patent conveyed the legal title thereto to the State of California, or is any evidence thereof as of the date of September 28, 1850; that it is not true that any subdivisional survey of said lands was made by authority of the United States under the provisions of the Act of July 26, 1866, or that any survey of the lands returned any of "the property" as swamp and overflowed lands on September 28, 1850, or that amongst any of the lands [341] so returned were any premises described in State Swamp and Overflow Survey

No. 34; nor was any description approved or adopted by the United States or carried into its patent to the State of California as its terms of description; that it is not true that any accretions, natural or artificial, appertaining or accruing to "the property" have become a part thereof, nor that plaintiff has no right, title, or interest therein nor to any part thereof beyond or north of the line or parallel, intersecting the northrly highland of Mare Island; whose northerly boundary is not the boundary of Mare Island existing in 1852; shown on defendants' Exhibit "B", referred to and incorporated in their answers, nor was said line the line established by the survey referred to by plaintiff's Exhibit "C"; nor was plaintiff at the time this action was filed, nor is it now, in possession of said survey.

LIV.

The Court erred in holding that it is not true that the grant by Juan B. Alvarado to Victor Castro did not embrace "the property".

LV.

The Court erred in holding that in 1877, pursuant to the authority given him by law, the Surveyor General for California caused the land confirmed in the Bissell and Aspinwall confirmation to be surveyed by Freeman, and thereafter approved said survey; that said survey was thereafter duly approved by the Commissioner of the General Land Office and said approved survey was in all respects validated by said final decree of confirmation.

LVI.

The Court erred in holding that it is not true that the claim of Victor Castro was inferior or subordinate in legal character to the Swamp and Overflowed Land Grant of September 28, 1850, or to the Federal patent to the same by the plaintiff to California; that said patent did not, by relation, become effective as of the date of September 28, 1850. [342]

LVII.

The Court erred in holding that it is not true that the confirmation referred to in Paragraph V of plaintiff's Bill of Complaint did not embrace "the property" or any part thereof; that it is true that said conveyance embraced all of "the property"; that it is not true that the executive order referred to in Paragraph VI of plaintiff's Bill of Complaint did not embrace "the property" or any part thereof, but that it is true that said executive order embraced all "the property".

LVIII.

The Court erred in holding that it is not true that the executive order referred to in Paragraph VII did not embrace "the property", or any part thereof, but that it is true that it embraced the whole thereof; that it is not true that the possession taken by plaintiff of "the property" was secured by trespass or without right or color of title; that it is not true that until March 9, 1928, any of these defendants were without legal capacity to maintain any legal action or equitable proceedings to recover pos-

session of said premises or to quiet the title of them, or any of them, in or to "the property", or that defendants had no legal or actual remedy to compel, any alleged trespass or entry of plaintiff, or of its officers, agents, or attorneys; that it is not true that these defendants, or any of them, did everything they could to resist any entries, intrusions, or alleged trespass of the plaintiff or its agents, prior to its acquiring said Federal patent to the State of California.

LIX.

The Court erred in holding that it is not true that any of the allegations in Paragraph XII of plaintiff's Bill of Complaint are a collateral attack on any final decree or judgment of the Supreme Court of the District of Columbia; that it is not true that the United States of America was not a real or substantial party to the mandamus proceeding referred to and is not concluded by any [343] judgment rendered therein; that it is not true that "the property" was a part of the public domain on September 28, 1850; that it is not true that any township survey, including field notes or report of the surveyor, were approved or accepted by the Secretary of the Interior or returned any of said premises as swamp and overflowed land, as provided in and directed by the terms and provisions of the Act of July 23, 1866; nor did said, or any, identification confirm said patent issued by the State of California to David M. Darlington.

LX.

The Court erred in finding and holding that it is not true that the United States Surveyor General for California, in the exercise of his judgment or discretion, determined that the northerly boundary of Mare Island extended to a point or station on San Pablo Bay to a point or station on the Napa River, the first station being designated on Freeman's Survey as Station 34 to said second Station No. 138; that it is not true that said alleged decision, so-called, of said Surveyor General was never modified by the Secretary of the Interior or was in full force or effect on the day the said fee simple title issued by the plaintiff to the State of California; that it is not true that the said line is a northern line of Mare Island, or is a southern boundary line of "the property", nor does the northern boundary of Mare Island closely approximate the parallel intersecting the northerly highlands of Mare Island, as depicted on defendants' Exhibit "B".

LXI.

The Court erred in holding that plaintiff is entitled to a judgment and decree, adjudging and decreeing that complainant is the owner in fee simple absolute and possessed of all the real property described in Paragraph II of plaintiff's Bill of Complaint, being the lands described and attempted to be described in said Swamp and Overflow Survey No. 34 and in the patent of said lands from the [344] United States to the State of California.

LXII.

The Court erred in holding that plaintiff is entitled to a judgment and decree; that neither of the defendants, or any, have any right, title, or interest in or to said lands, or any part thereof, by reason of the purported patents, conveyances, or instruments mentioned, or referred to in plaintiff's Bill of Complaint; and adjudging and decreeing that the conveyances and instruments, through and by virtue of which these defendants claim to derive a right, title or interest in the lands in question under David M. Darlington, particularly from the State of California, and his grantees are void and of no effect; and that each such conveyance made to him and made by these defendants be held for naught, surrendered up to and delivered up to the Court for cancellation.

LXIII.

The Court erred in holding that plaintiff is entitled to a judgment and decree, adjudging and decreeing title in and to the lands described in Paragraph II of plaintiff's Bill of Complaint be quieted as against all or any adverse claim of claims of defendants herein, or any of them, and that defendants be enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff; that plaintiff recover its costs of suit.

LXIV.

The Court erred in ordering entry of a decree herein in favor of complainant and against these defendants.

LXV.

The Court erred in failing to grant to these defendants the relief prayed for in their several answers on file herein.

LXVI.

The Court erred in denying defendants' motion to strike certain parts of the Bill of Complaint filed May 13, 1932, and each and every part of said motion, for the reasons and upon the grounds there- [345] in stated.

LXVII.

The Court erred in denying the written motion of defendants under reserved objections, and each and every separate motion therein contained, to exclude certain testimony offered by plaintiff, filed May 13, 1932, for each and every one of the grounds therein set forth.

LXIX.

The Court erred in denying the motion of the defendants to dismiss the Bill of Complaint under reserved exceptions, and each and every one of the motions therein contained, for each and every one of the reasons and upon each and every one of the grounds therein set forth.

JAMES E. O'DONNELL, et al.,
Defendants.

JAMES E. KELBY
SAMUEL M. GARROWAY
GORDON LAWSON
Solicitors for Defendants.

[Endorsed]: Service of the within Assignment of Errors by copy admitted this 10th day of April 1934.

H. H. McPIKE
Attorney for.....

Filed Apr. 10, 1934. [346]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING APPEAL BOND.

Notice of Appeal and Assignment of Errors having been filed in this Court by the defendants herein, on or about the 10th day of April, 1934;

NOW, THEREFORE, IT IS ORDERED that the said Appeal be and the same is hereby allowed; that the amount of defendants' bond on said Appeal be and the same is hereby fixed in the sum of One Thousand Dollars ($1,000.00), the same to act as supersedeas of the Judgment for Costs and Disbursements heretofore entered against said defendants.

It is further ordered that upon the filing of such security, a certified transcript of the record and proceedings herein, in accordance with the statutes and equity rules, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: April 10, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Apr. 10, 1934. [347]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
BALTIMORE 3964509

In the District Court of the United States, Northern District of California, Southern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

JAMES E. O'DONNELL, et al.,

Defendants.

STIPULATION FOR COSTS ON APPEAL
No. Equity 2787-S.

KNOW ALL MEN BY THESE PRESENTS, That FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America, Complainant in the above entitled case, in the penal sum of One thousand and no/100 ($1,000.00) Dollars, to be paid to the said Complainant, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That Whereas, James E. O'Donnell, et al., Defendants, are about to take an appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit to reverse the Order made on ....., 19...., and decree made and entered on the 17th day of January, 1934, by the United States District Court for the Northern District of California, Southern Division, in the above entitled case.

NOW, THEREFORE, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment and execution thereon mentioned in rule 34 of the District Court.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND
By D. E. GORTON
Attorney in Fact

Attest C. A. BEVANS [Seal]
Agent

Approved this 10th day of April, 1934.

A. F. ST. SURE
District Judge

Examined and recommended for approval as provided in Rule 29.

JAMES E. KELBY
GORDON LAWSON
SAMUEL M. GARROWAY
Attorneys for Appellants. [348]

State of California,
City and County of San Francisco.—ss.

On this 20th day of March, A. D. 1934 before me F. R. Webb, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared D. E. Gorton, Attorney-in-Fact, and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year first above written.

[Seal] F. R. WEBB

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 10, 1934. [349]

[Title of Court and Cause.]

STIPULATION AND ORDER RE TRANSMITTAL OF EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that the following original exhibits offered and received in evidence in the above-entitled cause, may be withdrawn from the files of the above entitled court, and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of said record on appeal, for the purpose of being considered and used by said appellate court on this appeal, with the same force and effect as though the same were incorporated in and made a part of the transcript on appeal.

That upon the determination of said appeal, all of said original exhibits shall be returned to the files of the above-entitled court.

The exhibits covered by this stipulation are as follows, to-wit:

PLAINTIFFS' EXHIBITS:

1. Plaintiff's Exhibit A, Dyer Survey, 1863.
2. Plaintiff's Exhibit B, Joy Survey, 1923.
3. Plaintiff's Exhibit F, Smith Board report.

[350]

4. Plaintiff's Exhibit G, Sloat Board report.
5. Plaintiff's Exhibit J, transcript of mandamus proceedings, U. S. vs. O'Donnell. (Three copies of this transcript, in addition to the original, are to

be furnished to the court on the hearing of this appeal.

5a. Plaintiff's Exhibit K, certified copy patent to California.

6. Plaintiff's Exhibit L1, Map—1775 (Photostat copy and translation.

7. Plaintiff's Exhibit L2, Map— (Mexican map and translation).

8. Plaintiff's Exhibit L3, Map—Mexico 1876 (Photostat copy).

9. Plaintiff's Exhibit L4, Map—1781 (photostat copy).

10. Plaintiff's Exhibit L5, Map—1825.

11. Plaintiff's Exhibit L6, Map—1798.

12. Plaintiff's Exhibit L6a, Map—1789.

13. Plaintiff's Exhibit L7, Map—1827-8.

14. Plaintiff's Exhibit L8, Map—1841.

15. " " L8, Map—1848.

16. " " L8b, Map—1849.

17. " " L9, Map—1849.

18. " " L10, Map—1851.

19. " " L11, Map—1850.

20. " " L12, Map—1850.

21. " " L13, Map—1850.

22. " " L13a, Map—1850.

23. " " L13b, Map—1852.

24. " " L14, Map—1849.

25. " " L16, Map—Top—1851.

26. " " L17, Map—1851.

27. " " L18, Map—1856.

28. " " L19, Map—1856.

29. " " L20, Map—1856. [351]

30. Plaintiff's Exhibit L21, Map—1856.
31. " " L22, Notes—1856.
32. " " L23, Map—1859.
33. " " L24, Map—1861.
34. " " L25, Map—1863.
35. " " L26, Map—1876.
36. " " L27, Map—1886.
37. " " L28, Map—March, 1916.
38. " " L29, Map—Feb. 2, 1915.
30. " " L30, Map—June 30, 1931—5533.
40. " " L31, Map—Nap. 1896-1899.
41. " " L8c, Map—copy Plat No. 16.
42. " " L31a, Map.
43. " " L32, Gibbs Map.
44. " " L33—Map.
45. " " L34, Map.
46. " " L35, Map.
47. " " L36, Map.
48. " " L37, Map.
49. " " L38, Map.
50. " " M, Report of Sanger Board, 1873.
51. " " N, photostat of map from Volume 6, page 5, Bancroft's History of California.
52. Plaintiff's Exhibit V, topographical map showing stations from which sand was taken.
53. Plaintiff's Exhibit Z, Freeman map, and accompanying file of documents in Freeman's Survey.

54. Plaintiff's Exhibit BB, part of probate proceedings of Edwin K. Sawyer.

55. Plaintiff's Exhibit GG and Plaintiff's Exhibit HH, Plat XI, Photostat of Mare Island.

56. Plaintiff's Exhibit II and Defendant's Exhibit 8, Tracing of Mare Island, Patton, etc. [352]

57. Plaintiff's Exhibit JJ, tracing of Map of 1861 of Mare Island.

58. Plaintiff's Exhibit KK, tracing of map of 1872-3, of Navy Yard.

59. Plaintiff's Exhibit OO, Relief Map prepared by Captain Carlson.

60. Plaintiff's Exhibit PP, Hillyard map.

61. Plaintiff's Exhibit RR (Defendant's Exhibits for Identification, No. 4 and No. 7).

62. Plaintiff's Exhibit TT (Navy Yard map showing contour, testified to by Captain Carlson.

63. Plaintiff's Exhibit UU, Map. (Part of Defendants' Exhibit 11 for identification).

64. Plaintiff's Exhibit VV, copy of Freeman's Survey.

65. Plaintiff's Exhibit WW, blueprints.

66. Plaintiff's Exhibit XX, large map of Mare Island and vicinity, and photostat of same.

DEFENDANTS' EXHIBITS.

67. No. 2, for identification, Map, McKay, 1910.

68. No. 3, for identification, Blue Print C. 242, etc.

69. No. 5, for identification, Map, State of California 1854.

70. No. 6, for identification, Map, 1925.

71. No. 9, for identification, Map, Mare Island Navy Yard.

72. No. 11, for identification, Letter and Map.

73. No. 12, Map.

74. No. 13, Photostatic copy map—Glover—1921 to 1923. [353]

75. No. 14, Map—1865.

76. No. 15, Map—1863.

77. No. 16, Map—1923.

78. No. 19, Certified copy field notes 315, 316, 317 and 318, Volume 396.

79. No. 26, Map—Beale.

80. No. 27, Notes and Map, 1856.

81. No. 28, Mare Island Straits—(Map).

82. No. 29, Chart, California—Mare Island Triangle.

San Francisco, California, May 25, 1934.

H. H. McPIKE,
United States Attorney.
ROBERT B. McMILLAN,
Asst. U. S. Atty.
ESTHER B. PHILLIPS,
Asst. U. S. Atty.
Attorneys for Complainant.
JAMES E. KELBY,
GORDON LAWSON,
Attorneys for Defendants.

On reading the above stipulation and good cause appearing therefor, IT IS HEREBY ORDERED

that an order may be made and entered in accordance therewith.

San Francisco, California, May 25, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 28, 1934. [354]

[Title of Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS BY CLERK OF THE UNITED STATES DISTRICT COURT TO THE CLERK OF THE CIRCUIT COURT OF APPEALS FOR PRINTING SAID EXHIBITS AS A PART OF THE TRANSCRIPT ON APPEAL.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that an order be made by the above-entitled court, authorizing and directing the clerk of this court to withdraw from the files of the above-entitled cause the original exhibits hereinafter enumerated and to deliver said exhibits to the clerk of the Circuit Court of Appeals for the Ninth Circuit, to be by him printed in the transcript of the record on the appeal taken in said cause to said Circuit Court of Appeals.

That when so printed, said original exhibits are to be returned to the files of this court.

The original exhibits covered by this stipulation are as follows:

1. Plaintiff's Exhibit C (Record in U. S. vs. Bissell, No. 311 U. S. Dist. Ct.

2. Plaintiff's Exhibit E (Bissell—Aspinwall deeds and papers accompanying same.

3. Plaintiff's Exhibit F, Smith Board report. (Maps accompanying this exhibit need not be printed, nor photostatic copies made of same.

4. Plaintiff's Exhibit G, Sloat Board report. (Maps and plans accompanying this exhibit need not be printed, nor photostatic copies made of same. [355]

5. Plaintiff's Exhibit H, letter February 9, 1853; letter February 12, 1853.

6. Plaintiff's Exhibit I, certified copy of Darlington Survey.

7. Plaintiff's Exhibit M, report of Sanger Board, 1873. (Maps accompanying this exhibit need not be printed, nor photostatic copies made).

8. Plaintiff's Exhibit O, photostatic copy of corrected report, Spanish and Mexican grants to California.

9. Plaintiff's Exhibit P, letter of Commissioner Richards to Secretary of the Interior, September 22, 1905.

10. Plaintiff's Exhibit Q, decision of Commissioner Tallman, September 16, 1914.

11. Plaintiff's Exhibit R, letter of Secretary of Navy to Secretary of Interior, February 12, 1925.

12. Plaintiff's Exhibit S, certified copy of field notes and report of James E. Freeman.

13. Plaintiff's Exhibit T, report of W. J. Lightfoot, January 6, 1915.

14. Plaintiff's Exhibit U, report of Francis E. Joy, October 23, 1922.

15. Plaintiff's Exhibit W, photostat from history of Solano and Napa Counties.

16. Plaintiff's Exhibit X, certified copy of record and map from United States vs. Pacheco.

17. Plaintiff's Exhibit Y, notice in "Daily Alta", California.

18. Plaintiff's Exhibit Z, file of documents in Freeman Survey. (Freeman Map accompanying this exhibit need not be printed, nor photostatic copies made of same.)

19. Plaintiff's Exhibit Z1, file of letters.

20. Plaintiff's Exhibit AA, documents, Third Session, 46th Congress. [356]

21. Plaintiff's Exhibit CC, record of certification of school land warrants, Solano County.

22. Plaintiff's Exhibit DD, survey found at pages 114 and 115 of same record.

23. Plaintiff's Exhibit EE, log of Mare Island from time of first commandant, Commodore Farragut.

24. Plaintiff's Exhibit FF, letter of Commandant Rogers to Commodore Rogers, February 26, 1873.

25. Plaintiff's Exhibit LL, letter of John Rodger to Board of Supervisors of Solano County.

26. Plaintiff's Exhibit MM, tidal planes.

27. Plaintiff's Exhibit NN, cross-section of Mare Island prepared by Captain Carlson.

28. Plaintiff's Exhibit QQ, letter of John Rodger to Robert Gardner, February 24, 1873, and letter

of Gardner to Rodger, November 25, 1873.

29. Plaintiff's Exhibit SS, letter of Edward T. Nichols to William Chandler, dated December 22, 1883.

30. Plaintiff's Exhibit YY, criticisms of map of 1854.

San Francisco, California, May 22, 1934.

H. H. McPIKE,
U. S. Attny.

ROBERT B. McMILLAN,
ESTHER B. PHILLIPS,
Attorneys for Complainant.

JAMES E. KELBY,
GORDON LAWSON,
Attorneys for Defendants.

On reading the above stipulation and good cause appearing therefor, IT IS HEREBY ORDERED that an order may be made and entered in accordance therewith.

San Francisco, California, May 25, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 28, 1934. [357]

[Title of Court and Cause.]

AMENDED PRAECIPE.

To the Clerk of the above entitled Court:

Please prepare a transcript of record to the United States Circuit Court of Appeals, upon which the appeal heretofore taken by defendants from the

final decree in the above entitled cause shall be heard, including therein the following documents:

1. Bill of complaint.
2. Stipulation for amended pleadings.
3. Amendment to amended bill of complaint.
4. Answer of defendants James E. O'Donnell, Fletcher M. Slosson, Frances Morse, Eleanor Caroline Whitman, Edmund Burke, and Walter E. Burke, as trustee, etc.
5. Answer of defendant Edmund Burke.
6. Joint and several answer of James E. O'Donnell and Juanita E. O'Donnell.
7. Joint and several answer of defendants Fletcher M. Slosson, Dorothy Slosson, Frank Clifford Morse, Frances Morse, Eleanor Caroline Whitman, and Alfred Whitman.
8. Answer of Frank R. Devlin to Bill of Complaint.
9. Substitution of Kelby & Lawson for Messrs. Athearn, Chandler, & Farmer and Frank R. Devlin, as solicitors for certain defendants.
10. Answer of defendant Villa M. Behan, filed January 7, 1931.
11. Order reviving action against defendants Walter E. Burke, [358] Administrator of the Estate of Edmund Burke, upon the death of Edmund Burke.
12. Stipulation that answer of Edmund Burke be deemed the answer of Walter E. Burke, as Administrator of the Estate of Edmund Burke, to amended complaint.
13. Motions and orders denying motions of defendants to dismiss bill as amended and to strike

out certain parts of the bill and to exclude certain testimony and exhibits offered by plaintiff and received in evidence.

14. Petition and order substituting Villa M. Behan, formerly Villa M. Burke, in place and stead of Walter E. Burke, as Administrator of the estate of Edmund Burke, deceased, filed February 13, 1934.

15. Petition and order substituting Villa M. Behan, formerly Villa M. Burke, in her own proper person in place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke, filed February 13, 1934.

16. Findings of fact and conclusions of law.

17. Decree.

18. Notice of appeal.

19. Assignment of errors.

20. Order allowing appeal and fixing appeal bond.

21. Citation.

22. Appeal bond.

23. Condensed statement of evidence.

24. Order approving narrative statement of evidence.

25. Amended praecipe.

26. Certificate of Clerk.

27. The following exhibits:

Plaintiff's Exhibit "A", Dyer Survey, 2 Maps—1863.

Plaintiff's Exhibit "B", Joy Survey—1923.

" " "C", Record in Case

No. 311, U. S. v. Bissell, et al., U. S. District Court.

Plaintiff's Exhibit "F", Report of Smith Board, etc.

Plaintiff's Exhibit "G", Report of Sloat Board, Report and Plans. [359]

Plaintiff's Exhibit "HH", Letter dated February 12, 1853.

Plaintiff's Exhibit "J", Mandamus Proceedings #4561.

Plaintiff's Exhibit "L1", Map—1775 (Photostat copy and translation).

Plaintiff's Exhibit "L2", Map—(Mexican Map and translation).

Plaintiff's Exhibit "L3", Map—Mexico 1876 (Photostat Copy).

Plaintiff's Exhibit "L4", Map—1781 (Photostat Copy).

Plaintiff's Exhibit "L5", Map—1825 (Photostat Copy).

Plaintiff's Exhibit "L6", Map—1798.

" " "L6a", Map—1789.

" " "L7", Map—1827-8.

" " "L8", Map—1841.

" " "L8a", Map—1848.

" " "L8b", Map—1849.

" " "L9", Map—1849.

" " "L10", Map—1851.

" " "L11", Map—1850.

" " "L12", Map—1850.

" " "L13", Map—1850.

Plaintiff's Exhibit "L13a", Map—1850
" " "L13b", Map—1852.
" " "L14", Map—1849.
" " "L15", Letter (correspondence) Nov. 28, 1849.
" " "L16", Map—Top—1851.
" " "L17", Map—1851.
" " "L18", Map—1856.
" " "L19", Map—1856.
" " "L20", Map—1856.
" " "L21", Map—1856.
" " "L22", Notes—1856.
" " "L23", Map—1859.
" " "L24", Map—1861.
" " "L25", Map—1863.
" " "L26", Map—1876. [360]
" " "L27", Map—1886.
" " "L28", Map—March 1916
" " "L29", Map—Feb. 2, 1915.

Plaintiff's Exhibit "L30", Map—June 30, 1931—5533.

Plaintiff's Exhibit "L31", Map—Map. 1896-1899.

Plaintiff's Exhibit "M", Record of Sanger Board 1873 and 3 Maps.

Plaintiff's Exhibit "N", Map.
" " "O", Spanish, etc. grants —Cal.

Plaintiff's Exhibit "P", Letter—Sept. 22, 1905.

Plaintiff's Exhibit "Q", Decision of Sept. 11, 1914.

Plaintiff's Exhibit "R", Letter—Feb. 12, 1925.

Plaintiff's Exhibit "T", Report Lightfoot.

" " "U", Report Joy—1915.

" " "V", 7 Pages Atlas for Identification. Introduced as Exhibit L38.

Plaintiff's Exhibit "W", Photostat Copy—Biography of E. H. Sawyer, and other papers.

Plaintiff's Exhibit "X", Certified copy decision and map. In U. S. v. Pacheco.

Plaintiff's Exhibit "Y", Advertisement—Daily Alta—Nov. 8, 1877, Page 4.

Plaintiff's Exhibit "Z", Copies Letters, etc.

" " "Z1", Copy—Letters.

" " "AA", Copy from Report of Surveyor General, 1878-1879.

Plaintiff's Exhibit "BB", Copy Will of B. H. Sawyer.

Plaintiff's Exhibit "CC", Photostat Copy Survey.

Plaintiff's Exhibit "DD", Photostat Copy Survey.

Plaintiff's Exhibit "EE", Certified Copy Log Book—U. S. Navy Yard, Sept. 16, 17, 18 and 19, 1854.

Plaintiff's Exhibit "FF", Copy Letter—Sept. 26, 1875.

Plaintiff's Exhibit "GG", Plat XI.

"HH", Photo—(Long).

"II", Tracing and Blue Print. [361]

Plaintiff's Exhibit "JJ", Photostat "Sketch of part of Mare Island showing location of Navy Yard and Magazine." Sept. 14, 1861.

Plaintiff's Exhibit "KK", Photostat Plan—"Navy Yard, Mare Island, Cal." 1872-1873.

Plaintiff's Exhibit "LL", Letter—Nov. 25, 1873.

Plaintiff's Exhibit "MM", Tidal Regimen—Mare Island Strait, (3 sheets).

Plaintiff's Exhibit "NN", Cross Sections—Plate IV. Physical Changes—Mare Island.

Plaintiff's Exhibit "OO", Relief Map (and two photographs).

Plaintiff's Exhibit "PP", Hilgard Map (Defendant's 10 for identification).

Plaintiff's Exhibit "QQ", 2 Letters—Nov. 24, 1873, and Nov. 25, 1873.

Plaintiff's Exhibit "RR", 2 Maps—(Defendant's 4 and 7, for identification).

Plaintiff's Exhibit "SS", Letter—Dec. 22, 1883.

Plaintiff's Exhibit "TT",—(Large Blue Print).

Plaintiff's Exhibit "UU", Map. (Part—defendant's Ex. 11, for identification).

Plaintiff's Exhibit "VV", Plate VIII—Present sand content of soil, etc.

Plaintiff's Exhibit "WW", Blue Print.
" " "XX", Large Map of Mare Island and vicinity, and Photo of same.
Plaintiff's Exhibit "YY", Mem. concerning Official Map of California of 1854.
Plaintiff's Exhibit "L8c", Map.—Copy Plat No. 16.
Plaintiff's Exhibit "L31a", Map.
" " "L32", Gibbs Map.
" " "L33", Map.
" " "L34", Map.
" " "L35", Map.
" " "L36", Map.
" " "L37", Map.
" " "L38", Map.

DEFENDANTS' EXHIBITS.

No. 1—for identification—Certificate of Redemption of Real Estate. Introduced as part of Exhibit "W".
No. 2—for identification—Map. McKay 1910.
[362]
No. 3—for identification—Blue Print Map C. 242, etc.
No. 4—for identification—Blue Print 569. Introduced as Plaintiff's Exhibit "RR".
No. 5—for identification—Map. State of California. 1854.
No. 6—for identification—Map. 1925.
No. 7—for identification—Map. Introduced as Plaintiff's Exhibit "RR".

No. 8—for identification—Map—1900. Introduced with Plaintiff's Exhibit "II".

No. 9—for identification—Map. Mare Island Navy Yard.

No. 10—for identification—Map Blue Print. Introduced as Plaintiff's Exhibit "PP".

No. 11—for identification—Letter and Map.

No. 12—Map.

No. 13—Photostatic copy Map—Glover—1921 to 1923.

No. 14—Map—1865.

No. 15—Map—1863.

No. 16—Map—1923.

No. 17—Certified Copy excerpt of History of Napa and Solano Counties.

No. 18—Certified Copy of Stipulation Boulden v. Phelps, No. 2965. Old cases.

No. 19—Certified Copy—Field Notes 315, 316, 317, and 318, Volume 396.

No. 20—List No. 208—Swamp, etc. Land.

No. 21—Certified Copy Patent.

No. 22—Page 64,—Survey 569.

No. 23—Copy Record of Patent. Survey 569.

No. 24—Copies—Communication, etc.

No. 25—List of Swamp, etc. Lands in Cal. (38).

No. 26—Map—Beale.

No. 27—Notes and Map. 1856.

No. 28—Mare Island Straits—(Map).

No. 29—Chart—Calif.—Mare Island Triangle.[363]

28. Stipulation and order re transmittal of exhibits to court of appeals.

Dated: this 2nd day of May, 1934.

JAMES E. KELBY,
GORDON LAWSON,
SAMUEL M. GARROWAY,
Solicitors for Defendants.

AFFIDAVIT OF MAILING.

United States of America,
Southern District of California,
Central Division.—ss.

ADELE LEVENSON, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of 18 years, and not a party to the above entitled action; that on the 2nd day of May, 1934, she served the within and foregoing Amended Praecipe in the above entitled action on H. H. McPIKE, United States Attorney, Post Office Building, San Francisco, California, by depositing a true copy of said Amended Praecipe in the United States Mails at the City of Los Angeles, California, with postage prepaid, to the said H. H. McPike, at the address aforesaid, and that at all times herein mentioned there has been, and now is, regular mail service between the City of San Francisco and the City of Los Angeles.

ADELE LEVENSON

Subscribed and sworn to before me this 2nd day of May, 1934.

[Seal] SAMUEL M. GARROWAY
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 3, 1934. [364]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

In addition to the documents and exhibits set forth in the Amended Praecipe of the above-named defendants for preparation of Transcript of Record on Appeal, filed herein on May 3, 1934, the above-named complainant desires incorpoated into the said Transcript the following documents and exhibits:

1. Plaintiff's Exhibit "D", Castro Grant and translation;

2. Plaintiff's Exhibit "E", Bissell and Aspinwall Deed and papers accompanying same;

3. Plaintiff's Exhibit "H", letters of February 9, 1853 and February 12, 1853;

4. Plaintiff's Exhibit "I", certified copy of Darlington Survey;

5. Plaintiff's Exhibit "S", field notes and documents accompanying same.

Dated: May 9, 1934.

H. H. McPIKE
United States Attorney,
Solicitor and Attorney for Complainant. [365]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING.

United States of America,
Northern District of California,
Southern Division.—ss.

R. B. McMILLAN, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age 21 years, and not a party to the above-entitled action; that on the 9th day of May, 1934, he served the within and foregoing Praecipe in the above-entitled action on Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway, 705 Signal Building, 811 West Seventh Street, Los Angeles, California, Solicitors and attorneys for the above-named defendants, by depositing a true copy of said Praecipe, together with a true copy of this Affidavit of Mailing, in the United States mails at the City of San Francisco, State of California, with postage prepaid thereon, to the said Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway at the address aforesaid, and that at all times herein mentioned there has been, and now is, regular mail service between the said City of San Francisco and the said City of Los Angeles.

R. B. McMILLAN

Subscribed and sworn to before me this 9th day of May, 1934.

[Seal] J. P. WELSH

Deputy Clerk of the U. S. District Court, Northern District of California.

[Endorsed]: Filed May 9, 1934. [366]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 366 pages, numbered from 1 to 366, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled United States of America, vs. James E. O'Donnell, et al. In Equity No. 2787-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $57.70 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of June, A. D. 1934.

[Seal] WALTER B. MALING
Clerk.

J. P. Welsh
Deputy Clerk. [367]

United States of America.—ss.

The President of the United States of America
To United States of America, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be

holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, VILLA M. BEHAN, formerly VILLA M. BURKE, substituted in the place and stead of WALTER E. BURKE, as administrator of the Estate of Edmund Burke, deceased, VILLA M. BEHAN, formerly VILLA M. BURKE, substituted in her own proper person in the place and stead of WALTER E. BURKE, as trustee for VILLA M. BEHAN, formerly VILLA M. BURKE, are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 10th day of April, A. D. 1934.

A. F. ST. SURE
United States District Judge.

Receipt of a copy of the above citation on appeal admitted this 10th day of April, 1934.

H. H. McPIKE
Attorneys for Complainant. [368]

[Endorsed]: No. 7522. United States Circuit Court of Appeals for the Ninth Circuit. James E. O'Donnell, Juanita O'Donnell, His Wife, Fletcher M. Slosson, Dorothy Slosson, His Wife, Frank Clifford Morse, Frances Morse, His Wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, Her Husband, Villa M. Behan, formerly M. Burke, substituted in the place and stead of Walter E. Burke, as Administrator of the Estate of Edmund Burke, Deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper person in the place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 18, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7522

JAMES E. O'DONNELL ET AL., APPELLANTS

v.

UNITED STATES

Upon appeal from the District Court of the United States for the Northern District of California, southern division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, October 15, 1937

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

Order of submission

Ordered appeal in above cause argued by Mr. James E. Kelby, counsel for appellants, and by Miss Esther B. Phillips, Assistant United States Attorney, counsel for appellee, and submitted to the Court for consideration and decision.

Excerpt from Proceedings of Thursday, October 22, 1936

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

Order directing filing of opinions and filing and recording of decree

By direction of the court, ordered that opinion and dissenting opinion this day handed the clerk of this court in above cause be forthwith filed by the clerk, and a decree be filed and entered in the minutes of this court in accordance with the majority opinion rendered.

(CLERK'S NOTE.—The opinions of the court which follow are the opinions rendered Oct. 22, 1936, as amended by order of June 7, 1937.)

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7522. June 7, 1937

JAMES E. O'DONNELL, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

DENMAN, *Circuit Judge:* This case began in a bill filed by the United States for the cancellation of two patents granting certain swamp and overflowed lands in the State of California to that state, the patent from that state to one Darlington, and the successor deeds thereto, and for the quieting of the title of the United States against the successors in interest to California in the patented lands. The lands are a part of Mare Island, northwesterly of the main plant of the Mare Island Navy Yard. The District Court held for the United States, and this appeal followed.

Preceding the reasoning and extended consideration of the authorities of this opinion is a brief chronological statement of the facts and successive issues presented and our holding in each.

The United States asserts it has deraigned title from one Castro, claimed grantee from the Mexican government. Also, if the Castro title is not valid, it claims title by virtue of reservations of the land for naval purposes, made after the lands were ceded to the United States by the Treaty of Guadalupe Hidalgo. Appellants, deraigning the title from the State of California, claim Castro had not title and that the lands were granted by Congress to California prior to the attempted naval reservations.

The government asserts that the evidence shows that in 1840 one Jose Victor Castro, a Mexican citizen, petitioned the then Governor of California, one Alvarado, for a grant of Mare Island, including the swamp and overflowed lands here in controversy. The acting Governor Jimeno gave Castro a provisional permit to occupy Mare Island, and on May 2, 1841, Governor Alvarado executed an instrument purporting to grant to Castro, Mare Island, including the land in question. No evidence of the recordation or filing of the grant in the archives of the Mexican government was offered.

We hold this evidence not available to the government because in the proceeding before the Board of Land Commissioners, hereafter discussed, in which the evidence was produced, the United States violated a trust relationship to the State of California with reference to these lands, or, alternatively, because California was a third party to the proceeding in which the evidence appears, both of which contentions are more fully considered hereafter.

We hold further under Berreyesa v. U. S., 154 U. S. 628, and other cases later cited, that even were these facts proved, they show no title in Castro because of the lack of filing or recordation of the grant in the Mexican archives.

On July 4, 1848, California was ceded to the United States by the Treaty of Guadalupe Hidalgo. We hold this treaty transferred the lands in dispute to the United States.

On September 28, 1850, by an Act of Congress, 9 Stats. 519, the United States granted to California whatever title it had to the swamp and overflowed lands here in question.[1]

The brief of the United States concedes "that the lands in controversy were swamp and overflowed in physical character and would have been swamp and overflowed lands under the Act of September 28, 1850", if they were public lands of the United States on that date.

The patents sought to be cancelled are for a part of these swamp and overflowed lands so granted to California. In this proceeding the patents establish the status of California and its successors in interest as present owners of the legal title. They further establish that California was granted, in praesenti, in 1850, the full equitable interest by the Congressional Act of that year, the United States reserving the bare legal title. This status, established by the patents, is the given quantity in the legal problem here involved. To overcome it, the government has upon it the extraordinary burden of proof necessary to defeat the title and rights established by such a solemn instrument.

On November 6, 1850, five weeks after the grant to California, President Fillmore made an attempt, formally perfect, to reserve Mare Island, including the swamp and overflowed lands, "from sale." On February 11, 1853, he again made an attempt, formally perfect, to make of Mare Island and these swamp and overflowed lands a "reservation of public lands" authorized under an act of Congress of August 31, 1852.

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[1] "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State. [Underscoring supplied.]

"§2. And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: Provided, however, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains aforesaid.

"§3. And be it further enacted, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation', shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"§4. And be it further enacted, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated." [Boldface supplied].

9 Stat. 519.

We hold that because of the prior grant to that State, neither reservation was effective to divest California's then full equitable interest in the lands in dispute.

On March 3, 1851 (9 Stats. 631, ch. 41), Congress created a commission of three commissioners "for the purpose of ascertaining and settling private land claims in the State of California." This act provided that anyone claiming title to lands in California derived from a Spanish or Mexican grant, must within two years present his claim to the commission which must render a decision on the validity of the claim. § 9 provided for a review of such decision by the District Court, and § 10 provided for an appeal to the Supreme Court. With respect to all lands, the claims to which were not presented to the commission within the two year period, such lands were to be considered as a part of the public domain.

§ 15 provided that the final *decrees* rendered, or any patent issued under the act "shall be conclusive *between the United States and the said claimants only, and shall not affect the interests of third persons.*" [Italics supplied.]

The act provided for service by the claimant on the United States and for its defense against the validity of the claimed Mexican titles. If there were such a defense it was the duty of the United States attorney to seek a "final decree" in its favor which "shall be conclusive between the United States and said claimants."

On August 31, 1852, the Castro claim was presented to the Land Commission by Bissell and Aspinwall, to whom it had come by mesne conveyances.

On January 4, 1853, the United States purchased the interest of the claimants Bissel land Aspinwall in the Castro claim to Marc Island, thereby merging in the United States the interests of both parties to the controversy. The deed declared the purpose of the purchase to be to carry out the provisions of an act of Congress to devote the property to the use of a United States Navy Yard.

We hold that by this transaction the United States sought to acquire the Castro title for its own use, and adverse to the use and interest of the State of California, its cestui que trust.

On Ocober 10, 1854, and after it had acquired whatever title Castro had, the United States for the first time appeared in the Land Commission proceeding in the taking of a deposition. Without advising the Commission of its personal proprietary interest in the Castro title, it proceeded to conduct a pretended controversy with Bissell and Aspinwall. Further depositions were taken and witnesses examined by both parties in this sham proceeding.

The United States contends that California was not a "third person" alien to this controversy within the meaning of the statute creating the commission, but contends that California and appellants here "are remote claimants under successors to, and in privity with, the United States of America"; and hence the decree in favor of the Castro title is a decree also against California and appellants, and they "are bound by said decree." This although at all times after its

appearance it was to the proprietary interest of the United States to establish that the Mexican government granted the lands in controversy to Castro and therefore that they were not ceded to the United States by the Treaty of Guadalupe Hidalgo.

Such action of the United States was at all times adverse to California, its cestui que trust to which, in the absence of a grant to Castro, the lands were granted by the United States in 1850.

On May 8, 1855, the Land Commission gave its decree against the United States, and confirming to Bissell and Aspinwall the Castro title, which they no longer owned.

On February 18, 1856, the United States filed its petition for review in the District Court, where, under the act, it was entitled to a trial de novo. The petition alleged that the Castro "claim is invalid." On the same day, Bissell and Aspinwall, who over three years before had transferred the title to the United States appeared and answered the petition, alleging "their" title "to Mare Island" "is a good and valid title" and praying an affirmance of the decree of the Land Commission.

Of date March 2, 1857, a decree affirming the decision of the Land Board, prepared for the judge, appears in the record. It was never signed. The case rested in this condition for 73 years. Appellants suggest that the reasons for this long non-action by the United States were the opinions of Attorney General Caleb Cushing, of date April 9 and October 12, 1853, later considered. These opinions were given after the United States had acquired the Castro claim, but before any testimony was taken before the Land Board. They declare that a pretended defense against the Castro claim "probably could not affect any adverse claimant" and that California "may set up, and probably maintain, title as against the United States, as to so much of Mare Island" as constitutes "uncultivatible overswamped land within its limits."

On March 18, 1857, about a fortnight after the date of the unsigned decree, the State of California gave to one David Darlington its patent to the Mare Island swamp and overflowed lands, identified as those in Survey No. 34, the lands in dispute. In the present suit the United States seeks also the cancellation of the Darlington patent from California, and of all intervening conveyances to and including those to appellants.

From March 18, 1857, Darlington and his successors in interest have persistently and in good faith maintained that they have held all the title to these lands which was granted to California in 1850.

Some time prior to March 6, 1928, a mandamus proceeding was brought on the relation of appellant O'Donnell against Hubert Work, then Secretary of the Interior, in the Supreme Court of the District of Columbia, to compel the Secretary to issue the patent of the United States to appellant O'Donnell and others for the lands in Survey No. 34. Proceedings therein were duly had and a peremptory writ issued to the Secretary to issue the patent. Appeal was taken

to the Court of Appeals of the District of Columbia where the issue of the writ was affirmed. Certiorari was not sought by the Secretary.

We hold that as to the decision against the Secretary it is res judicata as to the character of the lands in question as swamp and overflowed lands to which California, if it had been granted them by the Act of 1850, was entitled to patent by virtue of this identification by Survey No. 34 filed with the Secretary.

On April 15, 1930, in the District Court, the case of U. S. v. Bissell and Aspinwall was reopened, and a decree nunc pro tunc of March 2, 1857, was ordered in favor of Bissell and Aspinwall. The decree recites both the acquisition of their title by the United States and that the order directing a decree establishing the Castro title was "by consent of the United States District Attorney."

Neither the State of California, then holding the United States patent, nor any of its successors in interest appeared or were made parties to this action, and no notice of any kind given them. So far as California and its successors are cestuis que trust of the United States, the decree of April 15, 1930, was secretly obtained. Nevertheless the decree purports to be binding upon them, holding:

"* * * that all the right, title, and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons [California and its successors] *claiming by, under, or through the Appellants* [the United States] or the Appellees or any of them, are *chargeable with notice of this action* and of everything that has been done therein, and therefore, *that no rights of third persons have intervened or could intervene.*" [Italics supplied.]

We hold that California and appellants are not bound by the decree or anything done in the Bissell and Aspinwall case, whether they be regarded as cestuis que trust, claiming, as asserted in the decree, under the United States, which thus sought and procured a decision adverse to their interest, or as "third persons" alien to the litigation within the meaning of the act creating the Land Commission.

We further hold, sitting in this equitable proceeding, that, as in any such case, appellants may show by any evidence, whether within or dehors the Bissell and Aspinwall record, the adverse interest of the United States, as trustee, to that of its cestuis, California and appellants. They may thereby defeat the United States' assertion that, because they hold their equitable interest by grant of the United States, they are bound by the decree, by showing that such a contention cannot be maintained with clean hands. Michaels v. Post, 21 Wall. 398, 426.

We also hold that the decree is not binding upon appellants because it was given in a non-adversary action in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had.

The United States also contends, though not pressing it with vigor, that by the Treaty of Guadalupe Hidalgo there was a withdrawal of the swamp and overflowed lands in question because of the pendency of the invalid Castro claim. Such a withdrawal would remove the claimed area from the "public lands" category, and hence it would not pass to California by virtue of the grant of 1850.

We hold there was no such withdrawal.

I. The patents to California determine the satisfaction by the patentee of the requirements of the granting Act of 1850 as to identifying the land by surveys as swamp and overflowed land, of which the United States conveyed whatever title it had in 1850.

The patents sought to be declared void were given by the Secretary of the Interior to California under the compulsion of a mandate in a proceeding brought by the successors to the state title in the Supreme Court of the District of Columbia, in which litigation the Court of Appeals finally determined that the writ should issue. Work, etc., v. U. S. et rel O'Donnell, 23 Fed. (2) 136.

The authorities we discuss infra show that the above admission of the United States as to the swamp and overflowed character of the lands described in the patent is an admission that the Act of 1850 granted to California at least a full equitable and indefeasible interest in whatever property the United States then had in them. We take it that the United States is not seeking to cancel the patents because of a mere failure of the Secretary in some ministerial duty regarding the approval of one or another survey in his files—that is to say, invoking this court, sitting in equity, to avoid temporarily what ultimately must be done.

The compulsion of the mandate in the proceeding against the Secretary of the Interior required him merely to exercise his ministerial discretion. It did not prescribe the method of its exercise. In response to the writ he exercised it with reference to a survey in his files, called Survey No. 34, upon which the descriptions in the patent are based. His return shows the exercise of that discretion on January 10, 1925, in the following language:

"From the evidence before me I am led to the conclusion that the body or strip of land known as Survey No. 34, was, at the date of the swamp-land grant of September 28, 1850, swamp in character, * * * Accordingly, it is hereby declared to be swamp land, and, as such, subject to patent to the State of California in the absence of other sufficient reasons." Plf. Ex. J., p. 45.

Work v. U. S., 23 Fed. (2) 136.

Upon this approval of Survey No. 34, so evidenced in the Secretary's return, the writ of mandate was issued for the execution of the assailed patents. The Secretary's determination with regard to the survey and character of the land is conclusive and may not be collaterally attacked. Cragin v. Powell, 128 U. S. 691, 699; Knight v. U. S. Land Asso., 142 U. S. 161, 176; Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 571; Gauthier v. Morrison, 232 U. S. 452, 460.

The patent reverts back to the date of the grant of 1850, and conveys, as of that date, whatever legal title it then had, thus completing in law whatever had been granted in equity. French v. Fyan, 93 U. S. 169, 170, considered infra.

The United States nevertheless is entitled to seek to cancel the patent on grounds that it had no title to the lands, or that before the patentees' interest had become vested, in equity or at law, the lands had been reserved to a public use. U. S. v. Schurz, 102 U. S. 378, 396, 404.

II. The heavy burden of proof on the United States in seeking to cancel its patents.

In seeking to have declared void a patent from the United States, which by reverting to September 28, 1850, evidences a then grant of full legal title to the lands, the United States has a more than ordinary burden of proof. To avoid such "solemn evidences of title emanating from the Government of the United States under its official seal" requires the observance of the rule that it "cannot be done upon a bare preponderance of evidence which leaves the issue in doubt" even more than in suits between private parties for such cancellations. Only "that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 381, 382. This language was quoted and reaffirmed in U. S. v. Stinson, 197 U. S. 200, 204, 205. Also in Wright-Blodgett Co. v. U. S. 236 U. S. 397, 402, 403.

As stated, the patent, until overcome by such evidence, establishes the fee to the land in the appellants. As later shown, it also establishes the status of California as the cestui que trust of the United States, holding the full equitable title by virtue of the Congressional grant of 1850; the United States, as trustee, holding the bare legal title. This is the given quantity, to displace which this heavy burden rests on the United States.

We will now consider the claim of the United States that it has shown the validity of the Castro title by evidence in the instant case, as distinguished from its claim, later considered, that its validity is established by the decree in the Bissell and Aspinwall case.

III. Assuming that the Castro title could be established against the patents by new evidence in the instant case, commenced more than 65 years after the expiration of the time to file claims before the Land Board, its validity is not sustained here, because

(a) The paper writing purporting to be a certified copy of a writing in Spanish, in words of a Mexican grant to Castro, recorded in a county other than that of the location of the land, with no showing of execution of an original, and without acknowledgment, is not admissible under the California law, even though unsuccessful search for an original has been proved;

(b) Even if execution of some grant to Castro had been shown and the alleged copy offered in the course of proving the contents of an ancient document, it was not admissible because no proper

search for the original was made. Herein of the decision in the Bouldin v. Phelps case that the Castro grant was fraudulent and void certain ethical considerations relative to the conduct of the United States here seeking equity;

(c) Even if the execution by the Mexican government of a document in words of a grant to Castro had been shown, he did not acquire title, because the duplicate was not shown to have been filed in the Mexican archives;

(d) There is no evidence of even a possessory right in or possession by Castro.

Underlying all the government's several attacks on the patents to California, is its claim that one Castro, in 1841, was granted the swamp and overflowed lands by the Mexican government, which lands the United States acquired by mesne conveyance in 1853, that is after the grant to California in 1850. If this contention be correct, the United States did not acquire these lands from Mexico in the cession of area now constituting the State of California, and hence they were not granted to California by the Act of 1850.

(e) The paper writing purporting to be a certified copy of a writing in Spanish, in words of a Mexican grant to Castro, recorded in a county other than that of the location of the land, with no showing of execution of an original, and without acknowledgment, is not admissible under the California law, even though unsuccessful search for an original has been proved.

Aside from the record in Bissell and Aspinwall *v.* United States, which we hold, infra, cannot be considered against the California title, there is nothing in the transcript of the record of the trial below relating to a grant by the Mexican authorities of the lands here in question, to which the United States claimed to have deraigned title, but a copy of an unacknowledged, unsealed, and uncertified document in Spanish, shown only to have been copied on July 28, 1852, in the Book of Deeds in the office of the Recorder of Sonoma County, California. The bill alleges, and it is admitted, that Mare Island is in the county of Solano, not Sonoma, the place of the claimed recordation. Nor was it in Sonoma County on July 28, 1852.

By the Act of May 3, 1852 (Cal. Stats, 1852, p. 236), the boundaries of Sonoma County were so changed as to exclude Mare Island from that county. This Act under the California Constitution as it then stood went into effect on the date of its approval, that is May 3, 1852, over two months before the recordation. People *v.* Clark (1851), 1 Cal. 406.

That a certified copy of a document which is recorded in a county other than that where the land lies is not admissible under the statutes permitting the introduction of a copy of recorded instruments, is established by all the authorities. It will suffice to refer to Virginia, etc., Coal Co. *v.* Charles (1917), 251 Fed. 83, 102; 22 C. J., p. 883, § 967, and cases there cited.

The translation of the document shows the words of a grant from a former Governor, one Alvarado, to one Victor Castro. It purported to have been dated May 2, 1841. No original document was offered by the government.

Appellants below moved to strike it from the record, on the ground that such a document had no evidentiary value, citing Wilson v. Corbier, 18 Cal. 166. No contrary authority has been cited by the government and in brief and argument it offers no opposition to the contention.

The holding of the California Supreme Court that such a document acquires no evidentiary value under California's provisions for recordation (Cal. Stats. 1851, p. 199), and that it is not admissible as evidence of title, is clear. The report states the issue as follows:

"Ejectment for a tract of land, being a part of the Jimeno Grant, in Colusa County. Plaintiff, in deraigning title from Jimeno, offered and read in evidence a copy of the grant, with translation attached. Next, he offered a book from the Recorder's office of Colusa County, and asked to read therefrom what purported to be a copy, *in the Spanish language*, of a deed from Jimeno to Larkin and Missroom, executed in 1847. To the introduction of which defendants objected, on various grounds, but mainly that the deed, as recorded in said book, purported to be a copy; that there was no proof of the execution of an original, and that the *original did not appear to have been properly acknowledged, or proved and certified. Plaintiff then proved that he had made search for the original deed, without success.* The court ruled out the deed, and plaintiff excepted." [Italics supplied.]

Wilson v. Corbier, supra, 166.

The court held as follows:

"The plaintiff failed to deraign title. The deed from Jimeno to Larkin and Missroon was not proven. The deed was executed in 1847 and made a record in the office of Colton, Alcalde of Monterey. A copy in the Spanish language appears to be on the records of Colusa County. But we know no law which authorized the Recorder or Clerk of Colusa to record this copy so as to make it evidence, without further proof."

Wilson v. Corbier, supra, 167.

The document should have been excluded, for even had there been a proper search the copy was not admissible under the California law, which controls the admission of evidence in suits in the Federal courts involving title to California lands.

In Olcott v. Bynum (1873), 84 U. S. 44, the matter under consideration was a land title in North Carolina, and the question was as to the admissibility in evidence of a certified copy of a deed improperly recorded. As to this question, the Supreme Court said:

"It is one to be determined by the lex loci rei sitae. It is to be considered solely in the light of the statutes and adjudications of North Carolina. This court must hold and administer to the law upon the subject as if it were sitting as a local court of that state."

Olcott v. Bynum, supra, 57.

This, of course, is nothing more than a particular application of the general rule that in matters pertaining to real property the law of the situs governs.

In view of our holding, infra, that the record in Bissell and Aspinwall v. United States is not competent evidence against appellants deraigning the California title, the record here is bare of any evidence that prior to the Treaty of Guadalupe Hidalgo, Mexico, ever did anything to divest itself of its title to the lands in question. They therefore became public lands of the United States upon the cession to the United States by that Treaty.

(b) Even if execution of some grant to Castro had been shown and the alleged copy offered in the course of proving the contents of an ancient document, it was not admissible, because no proper search for the original was made. Herein of the decision in Bouldin v. Phelps that the Castro grant was fraudulent and void and certain pertinent ethical considerations relative to the conduct of the United States here seeking equity.

It should be noted, in this equitable proceeding, that the Castro deed became an ancient document because of the passage of time during the government's delay of seventy-seven years in prosecuting its unified non-adversary claimant-defendant appeal in the District Court. That is from 1857 to 1930, when, after over sixty years' delay before the Interior Department, and, finally, by pressure of mandate from the District Court of the District of Columbia, the United States in 1928 was compelled to recognize the 1855 Survey Number 34 and grant its patent for the lands so surveyed, and then, for use in cancelling its patent, caused the nunc pro tunc decree to be entered in the case in the California District Court. This should be considered in connection with the further claim of the government that by delaying for seventy-three years in taking its decree, really in favor of itself, it kept Mare Island subjudice, and hence not subject to patent, while it retained its use for its Navy Yard. Also it warrants its consideration in connection with the contention, considered infra, that the United States, as trustee, can conduct a proceeding against a faked opponent, though really against itself, and then claim the benefit of the judgment as adverse to its cestui.

We pass these considerations for the purpose of fully exploring the government's claims.

Assuming that there had been proof of the execution of some kind of document to Castro, and that the claimed anciency of the copy of the writing in Spanish is available to prove the contents of an original grant, all the authorities are agreed that a thorough search for the original must be made. No such search was proved to have been made by the government in this case.

In this connection it must be remembered that under the Mexican law there are two documents containing the words of a grant of land from that government. One is the original, held by the grantee, and the other is the copy which must be deposited in the Mexican

archives. The document sought to be proved is the claimed original, once in the possession of Castro, as grantee. Proper search for this document would require, first, inquiry of Castro himself, who is not shown not to be alive; if, as is likely, he is dead, then of his representatives and heirs; failing there, search among those to whom the document might have passed as a muniment of title, including Bissell and Aspinwall, and their heirs, or the successors to their papers and documents; and, finally, in the archives of the United States itself, the claimant seeking to avail itself of this title against its cestui. There is no evidence of any such search.

There is evidence of a search, more than sixty-five years after the appeal of the Bissell and Aspinwall suit to the District Court. This search was of the Mexican archives and of the records of the Land Commission in the office of the Surveyor General for California, who, it is claimed, became their successor custodian. With regard to the search of the Mexican archives, it is obvious that this is meaningless so far as concerns the original document, if any, given to Castro. That document has no reason to be in the Mexican archives.

So far as concerns the records of the Land Commission, we hold, infra, that the United States cannot avail itself of the transcripts of the evidence taken adverse to California in the Bissell and Aspinwall proceeding. There is, therefore, no evidence that the claimed lost document ever came into the possession of the Land Commission or became a part of its records. There is, therefore, no relevancy to evidence of a search of those records.

However, it appears that the government was charged with knowledge of the record in Bouldin v. Phelps (1887), 30 Fed. 547, in which the same court from which comes this appeal found that the claimed original Castro grant was given to it in evidence and was there held to be a fraudulent document, actually executed after Governor Alvarado had ceased to be Governor and after California had ceased to be Mexican territory.

In this proceeding in equity the District Court in the trial below should have had called to its attention the record in Bouldin v. Phelps, supra, which shows the existence of a controversy over the same document that is here relied on, and the presence of that document in that record in 1887, some thirty years after the hearing before the Land Commission, concerning the title in question here. The record in the same court, involving the same Mexican title, that court properly could consider under the decisions of

Lockhard v. Johnson, 181 U. S. 516, 520;

Criscuolo v. Atlas Imp. Diesel Eng. Co. (CCA-9), 84 Fed. (2) 273, 275;

National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336.

We pursue the consideration of the conduct of the United States in this case under the criterion laid down by Justice Miller. That criterion is that the evidence offered to cancel a patent of the United States must be evidence that "commands respect", U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 381, 382. We have seen the holding

f the obvious by the Supreme Court that the United States is bound o the bona fides towards its adverse citizen litigant, at least as great s that of private persons.

It is, therefore, pertinent to note that the Court below had, in its ecords, the case of Bouldin v. Phelps, involving the same grant to Castro; that in that case the United States District Attorney, appearing for the Commandant in charge of Mare Island, and an Attorney, appearing separately for the United States itself, there ought to prove, and succeeded in proving, that the Castro claim ould not defeat the title of the United States acquired by the cession f the Treaty of Guadalupe Hidalgo, because the alleged grant was raudulently executed. Bouldin v. Phelps, supra.

Entirely apart from the question of ethics involved is that of the ffect of this purposeful shift of position as to the validity of the Castro grant, within the judicial knowledge of the court below, on he right of the government, in a court of equity, to attempt to justify a search of the record in the Bissell and Aspinwall case, for the riginal Castro grant, as the place where last seen, when it knew it vas not last seen there.

We hold that no search has been made to justify the proof of the Castro grant as an ancient document.

(c) Even if the execution by the Mexican government of a document in words of a grant to Castro had been shown, he did not cquire title, because the duplicate was not shown to have been filed n the Mexican archives.

Even if we were to consider the testimony in the Bissell and Aspinwall case, it shows no grant to Castro. The Supreme Court has repeatedly held that the Republic of Mexico has not granted ands in the territory ultimately ceded to the United States unless t appears that the "grant from the Mexican government had been deposited and recorded in the proper public office among the public rchives of the republic.'" Berreyesa v. U. S., 154 U. S. 623.

That decision cites and relies on the following cases: U. S. v. Cambuston, 20 How. 64; U. S. v. Castro, 24 How. 349; U. S. v. Knight's Adm., 1 Black 251; Peralta v. U. S., 3 Wall. 440. All of these sustain he proposition there laid down.

If we were to seek a reason for the requirement that the grant arose rom the deposit and recordation, it is suggested by the finding, in the Bouldin case, supra, of fraud in the execution of the Castro grant by the Mexican Governor, after he had ceased to occupy the office. There are many reported cases in the federal courts upon similar charges of fraud.

Nowhere in the record of the Bissell case is it shown that there vas any deposit or recordation in the public archives of the Republic of Mexico of the claimed grant to Castro. Not only is there a failure o show a deposit in the Mexican archives, but Governor Alvarado, who claimed to have executed a grant to Castro, testified:

"Q. Was there any record of said grant kept in the archives?

"A. I do not remember.

"Q. Was it usual to keep a record of such grants?

"A. There was a book in which an entry was made of such grants generally though the Secretary might forget it.

* * * * * * *

"Q. Why did you not *as was your usual custom first make a decree annexed to the Expedient and then make the grant on a separate piece of paper?*

"A. Because. I was sufficiently well satisfied with what I did." [Italics supplied.]

The espediente is the recordation of the successive steps in the acquisition of title of California lands under the then prevailing Mexican law. The Supreme Court in the case of U. S. v. Knight's Adm., 66 U. S. 227, 245, 246, has described the documents necessary for recordation made in the espediente, as follows:

"These several papers—that is, the petition, with the diseno annexed, the order of reference, the informe, the decree of concession, *and the copy of the grant*, appended together in the order mentioned—constitute a complete espediente, within the meaning of the Mexican law." [Italics supplied.]

In the record before the Board of Land Commissioners appears a full transcript of the espediente as claimed by the government. It contains the petition, the order of reference, and the informe. It does not contain either the original, a duplicate, or a copy of the grant to Castro. If it were admissible, it would defeat the government's contention.

(d) There is no evidence or even a possessory right in or possession by Castro.

The government claims that the Castro claim was confirmable upon the basis of the incomplete espediente plus possession. It does not claim, and cannot claim, that mere possession in the absence of some showing upon which to base a grant warrants a confirmation of title. U. S. v. Serrano, (1867) 72 U. S. 451; Miller v. Dale, (1876) 92 U. S. 473; Romero v. U. S., (1864) 68 U. S. 721.

The only evidence upon which the claim of possession even colorably could be asserted is in the depositions before the Land Commission, taken after the United States had acquired whatever Castro claimed to have owned. The record containing these depositions we hold, infra, cannot be considered in evidence here, and, therefore, we hold that the government has not established any right in Castro based upon possession.

Even if we were to consider this evidence, it does not show that Castro's occupation of the Island, such as it was, was exclusive. It is entirely silent on this point. After putting horses on the Island, Castro went away with his brother; he did not live on the Island; he did not cultivate it; he did not make a home there; he merely pastured a few horses in the care of Indian caretakers. As to the swamp and overflowed portion of Mare Island as distinguished from its upland, it is a fair inference that the horses were pastured on the 700 to 800 acres of upland and not in the swamp.

That this is not a sufficient showing of possession to satisfy the standards established by the Federal decisions is apparent from U. S. v. Teschmaker, (1860) 63 U. S. 392, 402 to 404; U. S. v. Vallejo, (1860) 63 U. S. 416; Whitney v. U. S., (1897) 167 U. S. 529, 546; Bergere v. U. S., (1897) 168 U. S. 66, 79–80; U. S. v. Polack, (1857) 27 Fed. Cas. #16061, 580, 584–5; U. S. v. De Haro, (1862) 25 Fed. Cas. #14939, 805, 807–8.

Furthermore, the claimed Castro grant is of a certain place by name and without the mention or description of the boundaries. Hence, even if the horses and the Indians indicated possession of some part of Mare Island, the occupancy of the swamp land described by Survey Number 34 must be specifically shown. Nothing of the kind is shown by the depositions in the case before the Land Commission, even if they were admissible. The leading case establishing this rule is.

Higuera's Heirs v. U. S. (1865), 72 U. S. 827, 833–4. In that case the Supreme Court of the United States said:

"Concessions or grants of land by Mexican governors were of three kinds, and in some respects the rules applicable to their construction are widely different. They were concessions or grants by specific boundaries, where, of course, the donee is entitled to the entire tract of concession, or grants by quantity, as of one or more leagues of land situate at some designated place, or within a larger tract described by what are called out-boundaries; where the donee is entitled to the quantity specified and no more, *or grants or concessions of a certain place or rancho by some particular name, either with or without specific boundaries; where the donee is entitled to the tract according to the boundaries, if boundaries are given, and if not, according to the extent and limits of the tract or rancho as shown by the proofs of settlement and possession.*" [Italics supplied.]

This rule has found repeated expression in the later decisions of the United States Supreme Court. See, as illustrative:

Alviso v. U. S. (1869), 75 U. S. 337, 339;

Williams v. U. S. (1876), 92 U. S. 457;

U. S. v. McLaughlin (1888), 127 U. S. 428, 448.

Not only has this rule been frequently stated (and, so far as we have been able to find, without any dissent whatsoever), but it has also been applied in a number of instances. Thus, in the Alviso case the grant under consideration was of a place known as "Milpitas", as to which the Supreme Court said: (340)

"It is also a grant of a certain place by name and *as the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee.*" [Italics supplied.]

The court went on to consider this question and, in view of conflicting evidence, upheld the judgment of the court below approving the third survey of the tract.

See also U. S. v. Chaboya (1862), 25 Fed. Cas. #14769, 871.

We therefore hold that, insofar as concerns any direct evidence of the claimed grant to Castro, offered in the instant case, there is none. We therefore proceed to the consideration of the effect on the patents of the suit and decree of the District Court in United States v. Bissell and Aspinwall.

IV. The grant to California by the Act of 1850 was a grant in praesenti. It transferred to California the entire equitable interest in the lands, the United States thereafter holding the bare legal title. It removed the swamp and overflow area from the "public lands." Thereafter they were no longer lands from which could be made a Presidential reservation "from sale" or "of public lands."

On November 6, 1850, six weeks after the grant to California, President Fillmore attempted to make a reservation of Mare Island "from sale", as follows:

"The President of the United States *exempts and reserves from sale*, for public purposes, the following tracts or parcels of land in the State of California:

* * * * * * *

"On the eastern side of the Bay of San Pablo.

"6th. Mare Island.

"7th. The land on the eastern side of Mare Island Straits, beginning at the high hills between those Straits and the City of Benecia, about 2,000 to 2,500 yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the Straits so as to join them at a point about 800 yards north of the northermost high hills on the eastern side of the Straits." [Italics supplied.]

On February 11, 1853, a second reservation was made. This reservation was confined by the express provision of the congressional act of August 31, 1852, to a "reservation of public lands", the act providing that the Secretary of the Navy is

"* * * authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California, or neighboring waters, either by *purchase* or reservation of *Public Lands*, as the case may be, * * *." [Italics supplied.]

It will be noted that neither the reservation "from sale" nor of "Public Lands" purports to be or is an exercise of eminent domain, by which the United States sought to deprive California of her interest in the lands. The act expressly provides for "purchase" of any outstanding interest. It is immaterial under the act whether the outstanding interest be in California or in one holding by Mexican grant prior to the Treaty of Guadalupe Hidalgo. On April 2, 1853, the Secretary of the Navy requested the Attorney General's opinion as to whether under the provisions of the Act of March 3, 1853, the Funds appropriated therein may legally be expended for certain objects of construction at Mare Island. This Act appropriated the sum of $100,000 for such purpose with the provision "that before this sum shall be expended, the Attorney General of the United States shall

decide that the United States have good title to the land upon which buildings are to be erected."

Attorney General Cushing in his reply of the same date stated:

"I recommend therefor as indispensable prerequisites to any lawful expenditure of public money on Mare Island—

"First, that due investigation be had, through the District Attorney of the Northern District of California, or otherwise, into the claim of Henry Sanford, and any other ground of individual claim of date *subsequent to the conquest.*

"Secondly, that the State of California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the *overflowed* land of Mare Island." [Italics supplied.]

Congress in passing the act must have had the same view as to California's title as the Attorney General. California never relinquished the swamp and overflowed lands in the patents here attacked, though it did certain lands to the eastward of those in the patents.

The purported reservation of 1853 comprised:

"* * * that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, *together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island*, and the harbors, waters, and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses." [Italics supplied.]

The question of the power of Congress to divest a state to which it granted swamp and overflowed lands by the 1850 act early came before the Supreme Court. In the case of French v. Fyan, 93 U. S. 169, Congress, by that act, had granted the lands in question to Missouri. Later, in 1857, as here to California, a patent was issued to the State of Missouri. In the interim, under a congressional grant of 1852, the swamp and overflowed lands were certified in 1854 to the Missouri Pacific Railway Company. If it constituted a reservation at all, this certification of the lands by the Secretary of the Interior to the Railway under the Act of Congress of 1852 was as complete a reservation of the swamp and overflowed lands "from sale" and from the "Public Lands" as was the withdrawal of swamp and overflowed lands in dispute under the act of August 1852.

The Supreme Court held that the withdrawal by certification of the lands to the Railway under the act of 1852 could not divest Missouri of its title to the swamp and overflowed lands granted in 1850, since the earlier act was a grant in praesenti to that state:

"This court has decided more than once that the swamp-land act was a grant in praesenti, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to

the act granting lands to the State of Missouri, for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the act of 1850. For while the title under the swamp-land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company."

French v. Fyan, 93 U. S. 169, 170.

In many succeeding cases the Supreme Court has reaffirmed this decision that the grant of 1850 was such a present grant.

The principal established in French v. Fyan has recently been reaffirmed by the Supreme Court in U. S. v. Minnesota, 270 U. S. 181, where the cases and decision of the Secretaries of the Interior are reviewed:

"By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant *in praesenti*, its words being that the land described 'shall be, and the same are hereby, granted.' The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governer's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. ["As the grants are regarded as taking effect from the date of the laws making them respectively, and as *vesting the inchoate title in the states*, it follows that any subsequent *sale or location of swamp and overflowed lands must be held to be illegal* and the purchase money refunded, or a change of location ordered." 1 Lester's Land Laws.] That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253 ["This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant

by Congress does of itself *proprio vigore, pass to the grantee all the estate which the United States* had in the subject matter of the grant, except what is expressly excepted." * * * 9 Opinions Attorneys General, 253], was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. French v. Fyan, 93 U. S. 169, 170; Wright v. Roseberry, 121 U. S. 488, 500, et seq.; Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 570; Work v. Louisiana, 269 U. S. 250. A case of special interest here is Rice v. Sioux City & St. Paul R. R. Co., 110 U. S. 695. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 'operated as a grant *in praesenti* to the States then in existence', that it 'was to operate upon existing things, and with reference to an existing state of facts', that it '*was to take effect at once*, between an existing grantor and several separate existing grantees', and that as Minnesota was not then a State the Act made no grant to her." [Italics supplied.]

U. S. v. Minnesota, 270 U. S. 181, 202, 203.

In that case the grant to Minnesota by the act of 1860 differed from that to California in specifically excepting from a grant in praesenti "all lands which might be reserved, sold or disposed of (in pursuance of any law theretofore enacted) prior to confirmation of title under the grant—the confirmation being the issue of the patent" (204, 205). Under this exception in the grant it was held that a prior treaty with the Indians constituted a reservation of the lands, and thus was within the excepting clause of the act of 1860. The court also holds that even in the absence of such a specific exception, of lands reserved prior to the grant, these would be "impliedly excepted." In considering the Minnesota act of 1860 as a grant in praesenti the court again relies on the opinions of the Attorneys General and established practice of the Interior Department.

"The Act of 1860 was construed as we here construe it by Secretary Delane in 1874, 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 id. 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

U. S. v. Minnesota, supra, 205.

The opinion of Attorney General Moody so accepted by the Supreme Court was upon a case not as strong as that of appellants' here. After the 1860 grant to Minnesota, the Congress in 1872 authorized the Department of Agriculture to withdraw for forestry certain of the swamp and overflowed lands, just as did the act of August 1852 authorize the Secretary of the Navy to withdraw the lands here patented. The withdrawal of the Minnesota lands was prior to patent

under the act of 1860, and the question was whether the congressional withdrawal of the lands for forestry lands divested the state of its rights under the grant of 1860. The case was weaker for the Minnesota than for the California claim here, for here the swamp land patents have been issued. In deciding that the congressional withdrawal did not divest Minnesota of its rights under the earlier grant, the Attorney General says:

"Your first question is whether the swamp land grant is a grant in praesenti to the State of Minnesota of all the swamp lands therein, to be afterwards identified.

"I shall not dwell upon this question, because your Department and the courts have frequently held that it is such a grant.

"It has been held that the legal title does not pass until patent, and that when it does pass it relates to the date of the granting act. (Rogers Locomotive Works v. Emigrant Company, 164 U. S. 559, 570; Michigan Land and Lumber Company v. Rust, 168 U. S. 589, 591.)

"Aside from the decisions, it seems clear that the *intention of Congress was to give the beneficial title immediately to the State of all swamp lands in it*, as against claimants attempting to initiate rights afterwards, except under laws *theretofore* enacted." [Italics supplied.]

25 Ops. Attorneys General, 628, 629.

We thus see that the Supreme Court in 1926, in U. S. v. Minnesota, supra, reaffirmed the holding of French v. Fyan, supra, in 1877, that a subsequent congressional reservation cannot divest a state of its grant in praesenti of swamp and overflowed lands under the act of 1850. In 1886 the same question came before Mr. Justice Field and Circuit Judge Sawyer with reference to a claimed divesting of California by the act of August 1852 of the lands identical in character with that covered by the patents in this appeal, in San Francisco Sav. Union v. Irwin, 28 Fed. (CC) 708, 709, 715.

Mr. Justice Field relies on French v. Fyan and other cases as establishing the present character of the grant to California of the act of 1850, and holds that the Presidential reservation under the act of March 1852, the reservation here relied on to void California's patent, did not divest California of her title.

At the time of the trial there had been no certification of the lands to California by the Secretary of the Interior. The plaintiffs' case rested on the title granted by the state patent. The government's defense was that the act of 1850 was not a grant in praesenti. Upon this it asserted two propositions: (1) that, since California had no title, the lands were public lands of the United States and hence subject to and withdrawn by the Presidential withdrawal of 1853; and (2) that before listing the lands as swamp and overflowed to the state by the Secretary of the Interior California had no title and hence plaintiffs' showing that the lands were in fact swamp land overflowed in 1850 was not competent evidence.

In disposing of these contentions Mr. Justice Field, sitting with Circuit Judge Sawyer, held:

"This is an action to recover possession of a tract of land situated partly in the county of Napa, and partly in the county of Solano, consisting of 7,413 acres and a fraction of an acre. It is alleged to be swamp and overflowed land, and that the title to it therefore passed to the state by the act of congress of September 28, 1850, 'to enable the state of Arkansas and other states to reclaim the swamp lands within their limits' 9 St. 519.

"The first section of that act grants to the state of Arkansas 'the whole of those swamp and overflowed lands, made unfit thereby for cultivation', which were unsold at the date of its passage. The fourth section extends the provisions of the act to, and confers their benefits upon, each of the other states of the Union in which swamp and overflowed lands are situated.

"The act is a grant in praesenti, to each state then in the Union, of lands situated within its limits of the quantity described. Its language is that they 'shall be, and the same are hereby, granted to said state'—*words which import an immediate transfer of interest and not one in the future.* [708, 709]

* * * * * * *

"On the seventh of April 1874 the state, through her properly authorized officers, issued a patent of the tract in controversy to one George W. Pearson, describing it as swamp and overflowed land, and giving its metes and bounds. Through him, by various mesne conveyances, the plaintiffs trace their title, each having acquired an undivided one-third interest in the premises as tenant in common with the others. The state, by various enactments, had provided for the sale of lands of this character, and no question is made as to the conformity of the proceedings with their requirements in the issue of the patent. *The objection taken is to the acquisition of any title by the state until the lands had been listed and patented to her by the United States.* The patent of the state is the conveyance of whatever interest she had *at that time* in the land; and, if it were within the description of swamp and overflowed land, her interest was paramount to that of the United States, unless their title antedates the act of 1850. * * * In the absence of any action of the secretary of the interior which would be conclusive in the matter as against collateral attack, the testimony of witnesses having knowledge of the subject as to the character of the land was admissible under the decisions mentioned. That testimony clearly showed that the land was subject to periodical overflow by the rising of the tides in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it with levees from such overflow. [712]

* * * * * * *

"We do not give any weight to the fact that in 1853, by order of the president of the United States, Mare Island was reserved, with all its alleged appendages of tule or marsh lands ordinarily reputed

to belong to such island; *for if such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative—the title, as we have already seen, having passed to the state by the act of September 28, 1850.*" [715] [Italics supplied.]

San Francisco Sav. Union v. Irwin, 28 Fed. 708, 709, 712, 715.

Mr. Justice Field delivered the opinion in the Savings Union case on a trip to his circuit in July 1886. At the succeeding October Term of the Supreme Court he reaffirmed his holding in the Circuit Court that the grant to California was in praesenti in his opinion in the case of Wright v. Roseberry, 121 U. S. 488.

In Wright v. Roseberry, Mr. Justice Field again relies on French v. Fyan as establishing the present character of the grant of the act of 1850, and that thereafter the state cannot be divested by subsequent reservation. He also relies on the same opinions of the Secretaries of the Interior, Stuart and Schurz, cited as establishing the law in U. S. v. Minnesota, which, in turn, cites, at page 205, Wright v. Roseberry as establishing the present character of the swamp land grant to the states. One of the questions in the Roseberry case was whether, the 1850 grant being in praesenti, the holder of the deed from the state could establish by parol evidence the overflowed character of the land at that date. The Supreme Court held it could be so shown because after the 1850 grant the lands "were not afterwards public lands at the disposal of the United States."

"The court below held, and placed its decision upon the ground, that, because the Commissioner of the General Land Office had not certified the lands in controversy to the State as swamp and overflowed, when this action was commenced in 1870, there was no title in the state by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the Commissioner instead of the act of Congress; whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases to which our attention has been called.

"In Sacramento Valley Reclamation Company v. Cook, 61 Cal. 341, decided as late as 1882, that court recognized the swamp land grant of 1850 as one in praesenti. Its language was: 'It is as well settled as anything can be by the courts that the donation of swamp and overflowed lands by the United States to the states in which such lands were situated at the date of the passage of the act of September 28, 1850, "was a grant in praesenti, by which the title to those lands passed at once to the states in which they lay, except as to states admitted into the Union after its passage'," citing French v. Fyan, 93 U. S. 169.

"For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at

liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp land act of 1850 took effect. *If they are proved to have been such lands at that date, they were not afterwards subject to preemption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State*, and after the segregation map was deposited with the surveyor general of the state, with notice also that they were actually segregated and claimed by the State as such lands.

"Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion." [Italics supplied.]

Wright v. Roseberry, 121 U. S. 488, 520, 521.

Not thereafter being "public lands" of the United States, they therefore could not be withdrawn by the act of 1852 authorizing a reservation from "public lands" as here claimed by the United States to avoid the instant patents to California.

The Appeal in San Francisco Saving Union v. Irwin (136 U. S. 578), came before the Supreme Court shortly after Wright v. Roseberry. The United States appeared on the appeal, giving the decision a finality it could not have against Commandant Irwin, a mere administrative officer. The government's bill of exceptions abandoned the claim that the reservation under the act of 1852 divested California of the lands now in the patents sought to be voided. The sole point raised was whether, there being a grant in praesenti, and the lands no longer public lands, as held in Wright v. Roseberry, but no certification of the lands to the state, the overflowed character of the land in 1850 could be shown by parol. The Supreme Court held on the authority of Wright v. Roseberry that it could. Irwin v. San Francisco Savings Union, 136 U. S. 578, 580.

The government here relies on District Judge Van Fleet's opinion in Sawyer v. Osterhaus, 212 Fed. 765, as overruling Justice Field's and Circuit Judge Sawyer's decision in the Circuit Court in the Irwin case. This was a suit in ejectment brought by Sawyer against Osterhaus, Commandant of Mare Island Navy Yard, and having in possession the swamp lands in Survey No. 34, here in question. Sawyer deraigned title from the Darlington patent. Since California then had not acquired its patent from the United States, Sawyer could not show legal title. The court rested its decision denying ejectment on the ground "that plaintiff has wholly failed to make out, as was incumbent upon him, a legal title to the premises in suit." (775)

Continuing as a dictum, but declaring he did not rest his decision on it because "it was not urged upon the attention of the court", Judge Van Fleet says, "I think" that the Congressional Act of 1850 did not constitute a grant in praesenti, and hence the two naval reservations would defeat the right of California to a patent. Not only is this a mere dictum, but had it been a holding, it decided nothing in favor of the United States. The Attorney General made a

special appearance in the case, claiming it should be dismissed because the United States was the real party in interest, and had not given permission to be sued. The motion was denied on the ground that the title of the United States was not involved. (Sawyer v. Osterhaus (D. C.), 195 Fed. 655.) A judgment for or against the Commandant's possessory right would not estop either the United States or the California claimants in a subsequent suit between them. Hussey v. U. S., 222 U. S. 88; Carr v. U. S., 98 U. S. 433, 437.

This District Court dictum was many years before U. S. v. Minnesota, and is of no weight against the latter's holding of the present character of the grant to California. Judge Van Fleet's error rested on the assumption that the grant of 1850 is a grant in futuro vesting nothing in California until the date of the certification of the lands by the Secretary of the Interior or of the ensuing United States patent, and that before that time the swamp lands remained "public lands" subject to a Presidential reservation. He cites certain decisions on school land grants as supporting this thesis, failing to note the essential difference between the present grant of swamp lands and the future and promissory quality of the school land grants.

The school land case of Heydenfeldt v. Daney, 93 U. S. 634, 638, 639, cited by Judge Van Fleet, and which precedes Wright v. Roseberry, construes the school land grant as in futuro. Wisconsin v. Hitchcock, 201 U. S. 213, also cited by him, rests on U. S. v. Thomas, 155 U. S. 577, 582. They hold merely that lands of which the Indians had a right of occupancy prior to the school land grant, were not included in it. In U. S. v. Morrison, 240 U. S. 192, the school land grant to Oregon was held to be in futuro and not to prevent an intervening reservation for forestry purposes.

All these cases precede U. S. v. Minnesota, 270 U. S. 181, 210, where the distinction between the two characters of grant is clearly made. One of the cases relied on in Sawyer v. Osterhaus, supra, is Minnesota v. Hitchcock, 185 U. S. 373, deciding the future vesting of a school land grant to Minnesota. In U. S. v. Minnesota, the school grant of the Hitchcock case is distinguished from swamp land grants, as follows:

"The case of Minnesota v. Hitchcock, 185 U. S. 373, is cited as making for a different conclusion; but it does not do so. The question there was whether the State was entitled, under the school land grant, to sections 16 and 36 in the part of the Red Lake reservation which was ceded under the Act of 1889. That grant was expressed in words of promise, not of present grant. Title was to pass when the lands were identified by survey, if they were *then* public; and if *at that time* they were not public but otherwise disposed of, the State was to be entitled to other lands in their stead." [Italics supplied.] U. S. v. Minnesota, supra, 210.

The court regarded the holding that the swamp land grants were in praesenti was necessary to the decision of U. S. v. Minnesota. If they were in futuro there would have been no question that the

Indian treaties of 1863 and 1865 took the swamp and overflowed lands of the 1860 grant which had not then been certified to the state. On the question whether a treaty with another nation had some higher constitutional power to divest Minnesota's title than a statute reserving the lands, the court expresses grave doubt, but avoids deciding it by a construction of the treaty's terms as not intending such taking from the state. U. S. v. Minnesota, supra, 208, 209. If French v. Fyan, supra, and the succeeding cases had not settled the question of the immediate vesting of the full equitable title of the swamp lands in California, a similar construction of the act of August 1852 would lead us to conclude that Congress did not intend to take any lands from California of which lands it had vested in California the full equitable title; and that the 1850 reservation of Mare Island "from sale" contemplated the upland portion of the island, which, until recently, contained all the Navy Yard plant, and not California's swamp and overflowed lands on its then doubtful borders.

The patents and appellee's admission of the swampy character of the lands, and the case of French v. Fyan and succeeding cases, reviewed above, conclusively establish that whatever title the United States had prior to the grant of September 28, 1850, thereafter, at most, it held the bare legal title in trust for California, to which then had been transferred, in praesenti, the entire equitable interest.

We therefore hold that neither of the attempted reservations made by the President and the Secretary of the Navy after the Congressional grant of 1850 divested California of its full equitable interest vested by the grant.

V. The United States seeking equity, can take no benefit against California and its successors from the decree in United States v. Bissell and Aspinwall confirming Castro's invalid Mexican title, because

(a) If that suit, in its ordinary course, would be binding upon California, as the then holder of the equitable title under the prior grant of 1850, in this case it would not so be binding because the United States, holding whatever legal title it acquired from Mexico, and required by the statute to defend it as California's trustee against the Castro title, prior to appearing against that title, acquired it for its own governmental use and thereafter appeared before the Land Commission, and waging a pretended adversary proceeding in which its private interest was adverse to its trust, carried it to a decree adverse to California;

(a) We consider the contention of the government relative to the advantage it may take of the District Court decree of 1930 rendered in the Bissell and Aspinwall case, having in view that its burden of proof to cause cancellation of the patents can be sustained only on "that class of evidence which commands respect."

The United States contends that the California title to the lands was defeated by the 1930 decree of the District Court, given on appeal in the proceedings before the Land Board created by the Act of

Congress of 1851. The Act provides for filing with the Board of Land Commissioners of all claims to land based on Mexican titles and their adjudication as against the United States.

The United States' briefs here claim that whatever rights California held when the litigation was pending before the Land Board, then were in the United States and that California could not there appear as a party. We here consider this contention, disregarding any effect of the patent of 1928 as reverting the transfer of the legal title back to 1850. We have seen that, since the lands are admitted to be swamp and overflowed, the United States, prior to the contested patents, held a bare legal title in trust for California. As was said by the Supreme Court, in a case determining the condition of unpatented swamp and overflowed lands, by applying to them the law regarding the homesteader,

"'*The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law.* Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department.' Orchard v. Alexander, 157 U. S. 372, 383." [Italics supplied.]

Brown v. Hitchcock, 173 U. S. 473, 478.

Whatever title Castro had had been acquired by Messrs. Bissell and Aspinwall. They presented their claims to the Land Board and issue was joined by the United States, the adversary party created by the statute. Although appellants, before the decree rendered in 1930, held the 1928 patents giving them the legal title, they were never made parties to the action, nor asked to present their rights amicus curiae. The decree was obtained without their knowledge.

While the proceedings were pending the United States in 1853 bought from Bissell and Aspinwall their claim under the Castro title. We thus have the United States claiming here that it acquired the Mexican title from its adversary parties and then proceeded to the trial of the controversy as to its validity in simulated opposition to litigants no longer having an interest, and that it thereby established in itself a title adverse to California.

The depositions taken in this situation, reprehensible in a court of law, and, if anything, more so in a court of equity, show a most perfunctory cross-examination of the witnesses, presumably offered by parties opposed to the government, but, in fact, representing its acquired interest. The result of such an examination by pretended adversaries seeking the single objective of a perfect title gave to Governor Alvarado and the other witnesses the opportunity to disprove the fraud suggested in some of the questions and found in the Bouldin v. Phelps case, supra. In its pretended adversary position the government "rode to a fall" to perfect the title it had acquired.

However, this court is not required to measure the industry and effectiveness of the performance of the government's statutory duty and obligation to California to resist the Castro claim. Once the

government acquired the interest adverse to California, its cestui, it can take no advantage from the proceeding before the Commission.

"We have no desire to weaken or qualify in any way the wholesome doctrine laid down by this court in the case of Michoud v. Girod, 4 How. 503, that a trustee cannot legally purchase on his own account that which his duty requires him to sell on account of another, nor purchase on account of another that which he sells upon his own account—in other words, he cannot unite the two opposite characters of buyer and seller. So jealous is the law of dealings of this character by persons holding confidential relations to each other, that the cesqui que trust may avoid the transaction, even though the sale was without fraud, the property sold for its full value, and no actual injury to his interests be proven."

Hoyt v. Latham, 143 U. S. 553, 566.

"Convinced that the relation of the parties was fiduciary and not merely contractual, we are unable to accept the view thus outlined. It would require a clear case to warrant a court of equity in declaring that the trustees of an express trust, in the very course of their administration of the trust, had acquired a dominant interest in the trust property and in effect a discharge of the trust, through mere inattention or even negligence—not raising an estoppel or amounting to laches—on the part of the parties beneficially interested, or of their executive officers. Conduct merely equivocal, or apparently inconsistent with a vigilant insistence upon the obligations of the trustee, is not sufficient to discharge a trust. The cestui que trust is entitled to rely upon the fidelity of the trustee, until plainly put on guard against him.

Chicago &c. Ry. v. Des Moines &c. Ry., 254 U. S. 196, 220.

On the basis of the government's assumption that California was not a "third persons" and could not appear as a party, because her equity was held in trust by the United States, the Government appears in a position to which the language of Mr. Justice Chase seems applicable: "I think the United States are not absolved in dealing with their citizens, from the obligations of honesty by which individuals are controlled." Mason v. U. S., 17 Wall. 67.

It does not ameliorate the situation, but rather heightens it, when we consider that the evidence of the depositions so taken shows that Castro did not have any grant of land from the Mexican Government under the clear provisions of the Mexican law.

It cannot be said that the United States unconsciously violated its duty to its cestui. On April 9, 1853, over a year before the first deposition was taken, the United States Attorney General Caleb Cushing gave an opinion on the Castro proceedings before the Board of Land Commissioners. (Vol. 8, p. 22, Op. Atty. Gen.) The review is made with reference to the effect of the purchase by the United States of the Castro title pending these proceedings. His letter to the Secretary of the Navy, in specific language, sustains the contention here made by appellants. Speaking of the purchase of

this Castro claim he says this is done by "the payment of a large sum of money to silence and extinguish it, which seems has accordingly been done." Discussing the further conduct of litigation, he says:

"True, the United States may decline to resist the claim of Castro on the pending suit, and, by consent, and by omission, to enter an appeal, may, in fact *take the side of the adversary party*, his claim being vested in them, and allow a final judgment to be entered affirming the grant to Castro. *I, as Attorney General*, in view of the special duties imposed on me by the Acts for the settlement of private land claims in California, and of my general obligation to look after the rights of the United States in the premises, *cannot pursue this course*. I must not admit that the purchase of the Castro claim by the United States does not operate in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro." [Italics supplied.]

The general rights of the United States referred to included its right as trustee for the State of California to conduct a true adversary contest against the Castro claim. The rights of the State of California are recognized in Attorney General Cushing's opinion, as follows:

"I am satisfied that the State of California may set up, and probably maintain, title as against the United States, to so much of Mare Island as is subject to overflow by water, periodically or otherwise, that is, at least to all below high water mark.

* * * * * * *

"In the second place, by an Act of Congress, passed the 28th day of September, 1850, all the swamp and other overflowed lands in the State of Arkansas made thereby unfit for cultivation are granted to said state; and then provisions of the Act are extended to and its provisions conferred upon each of the other states of the Union in which such swamp and overflowed lands may be situated. The State of California had already, by Act of September 9, 1850, been admitted into the Union, and is, of course, entitled to all the uncultivable over-swamped land within its limits, as against the United States."

His opinion further expresses a Lawyer's proper doubt that the transaction between Castro grantees and the United States would affect the right of any "adverse claimants save the grantees of Castro." His language is:

"In addition to which it is to be considered, that, whatever might be the legal effect, by way of waiver, estoppel, or otherwise, of any transaction in the premises by the Castro grantees and the United States, probably no such transaction could affect the rights of Sanford, or any other adverse claimants save the grantees of Castro. Sanford, or any other party, may not be precluded by anything the United States can do, from setting up a claim better than Castro's,

that is, denying the validity of the original grant to Castro, and so ousting the United States."

The appellant claims some adjudicatory force to this opinion of the Attorney General. We cannot agree with this contention, but do agree that the prescience of this able lawyer truly recognized the legal principles controlling the action of the government in the Castro litigation before the Board. The appeal to the District Court from the decision of the Land Board was taken by the Attorney General in February 1856. The judicial farce continued there, the pretended attorneys for the Castro interest resisted the appeal. Then followed, in 1857, an unsigned decree affirming the decision of the Land Board which is described as "rejecting the [Castro] claim." It then proceeds to declare that it is a good and valid claim. Then follows an appeal by the United States to the Supreme Court. Then a vacation of the appeal, no doubt because there was no decree.

The unsigned decree left the case under submission to the court for 73 years. The United States, on April 15, 1930, moved for the decree presented here as foreclosing the State of California. The intent to shut out the State of California by this non-adversary proceeding is openly declared in the 1930 decree's finding that the United States had purchased the Castro title,

"* * * and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene."

When this decree was rendered appellants holding the California title were the parties referred to as "claiming by, under, or through" the United States. California then held the United States patent sustaining appellants' claim to the land. The declaration that California or its successors could not be a party to the action by which its title is claimed to be barred, seems to impose a duty on the United States to notify it of the proceeding and ask it to advise the court amicus curiae as to any defect in Castro's title, about which the Attorney General had expressed such doubt. That it did so is a fitting termination of the whole litigation.

Since the evidence shows the United States conducted the concealed non-adversary proceeding to secure Mare Island as a Naval Station, with the full knowledge that it would embarrass the claim of the State of California to the swamp lands, the situation is not unlike that considered in the case of U. S. v. Throckmorton, 98 U. S. 61.

There the United States, by its bill in equity, sought the cancellation of its patent which had been granted to one Richardson, the holder of the Mexican title, pursuant to a decree of the Board of Land Commissioners. The claim of the United States was that its agent at the hearing before the Commission had betrayed its interest to its adversary, Richardson, by failing to disclose to the Land Board evidence of fraud in the acquisition of the title from Mexico. The

court held the betrayal was not shown, it not being alleged that the agent "was then interested in the [adversary] Richardson claim." If such interest had been shown, "the case would have come within the rule which authorizes relief." U. S. v. Throckmorton, supra, 69.

The rule referred to as authorizing relief is stated by the court at pages 65 and 66, as follows:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, *there was in fact no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has *never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing.*" [Italics supplied.]

U. S. v. Throckmorton, supra, 65, 66.

In equity the difference between the contentions of the United States in the Throckmorton case and in the case at bar has a profound legal as well as ethical significance. In the former it sought relief against an outstanding title, which would have been given if its agent in the Land Board had been interested in the Mexican claim. Here it asserts the Board's action adjudicated to it the Mexican title in which, not merely it had an interest, but which, previously and unknown to the Land Board, it had acquired in its entirety. It does this purposefully to aid it in holding its Mare Island lands against the claim of cestui.

The case falls within the rule stated in the Throckmorton case and the appellants are entitled to the relief. Such relief is not confined to annulling the decree and reopening the Bissell case for a further hearing on matters alleged to have occurred nearly a century ago. Proper relief here can be given by granting the motion to exclude from evidence the record in the Bissell and Aspinwall case, because "since the 4th day of January 1853 Bissell and Aspinwall, grantors of the United States, were no longer interested in the premises."

It may be suggested that the majority opinion reasons in a circle; that the majority assume that the United States held the legal title in trust for the State under the Swamp Land Act and that therefore the appellants, as successors in interest, may question the confirmation proceedings; whereas, so it may be urged, until the confirmation proceedings are disposed of no equity in the State is shown which would give it, or appellants as its successors in interest, any standing to attack the proceedings.

This line of argument wholly misconceives the status of California and its successors as recognized by the government's bill, and its burden of proof to obtain its remedy. Implicit in this bill, so recognizing the patents which it seeks to cancel, is the recognition of the status of the United States as holder of the bare legal title in 1850, at the time of the grant to California, in trust for California as its cestui, having the whole equitable interest.

The situation might be differently conceived if the State of California or its successors in interest were maintaining some sort of a legal proceeding against the government, in which, as complainant, it was seeking to establish title to the land and to procure a patent based upon a final determination of title. There the burden of proof would be upon the State or its successors. In such a suit it well might be argued that in attempting to base their claim upon the trustee and cestui relationship they were seeking to lift themselves from their stance by their own bootstraps.

Here, since the government's bill recognizes the existence of the trustee-cestui relationship of 1850, culminating in the patent of 1928, which it seeks to destroy, it has the heavy burden of proof stated in the authorities cited above to establish the contrary. It is the government which must lift appellants from their stance on the trustee-cestui relationship.

So far as concerns this court, sitting as a court of equity, and considering the relationship of the United States to its cestui, the State of California, we agree with the assignment and specification of error of appellants that the Land Board action had terminated as far as affecting California, when the two litigants merged their adverse interests by the sale to the United States. In equity that case ended before any testimony was taken. So far as concerns the State of California and these appellants nothing that hereafter occurred, including the decree of April 15, 1930, can, in equity, affect either their equitable or legal rights.

In the alternative, it is also arguable, but not necessary to decide, that if the decree made valid to the United States the invalid Castro title, and hence falsely proved that the lands were not ceded to the United States by the Treaty of Guadalupe Hidalgo and therefore not granted to California in 1850, the United States would hold the Castro title in trust for California.

V. (b) In this suit in equity the record in Bissell and Aspinwall's action is not made "conclusive" against appellants by §15 of the Land Board Act.

The claim of the State of California to the swamp and overflowed lands of Mare Island is that of interest of a third person alien to the Land Commission action and to both the noninterested Bissell and Aspinwall and the conflicting interested United States, as the term "the interest of third persons" is used in §15 of the Act.

Much of the comment on the conduct of the government would not be warranted did it not insist that, by section 15 of the Act of 1851, creating the Land Commission, the record and decree in the Castro

proceeding there are "conclusive" against California and its successors in interest. The government insists that, by the decree in that case, California is bound to be under the jurisdiction of the Land Board and court and bound by "its decision", and not to have the interest of an alien third person.

Congress, in passing the Land Commission Act of 1851, must have done so in view of its act of granting, in the previous year, to California the vast area of swamp and overflowed lands and California's interest therein as against those of invalid Mexican claims.

Section 15 of the Act provides:

"That the final decrees rendered by the Commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this Act shall be conclusive between the United States and the said claimants *only* and shall not affect the *interests of third persons*." [Italics supplied.]

The phrase "interests of third persons" in the Act of 1851 as affected by a judgment to which they were not parties, recently, in 1849, had been considered by the Supreme Court in the leading case on that subject, Lord v. Veazie, 8 How. 251. It was a decision of such importance that it must have been familiar to all the bar and to the Congress. In that case, on motion of "third persons", alien to the action and the writ of error, for its dismissal, the court granted the motion, holding:

"* * * The objection in the case before us is, * * * that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the *interest of third persons*, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

"* * * A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed." [Italics supplied.]

Lord v. Veazie, 8 How. 255.

In view of this decision it would require an unequivocal decision of the Supreme Court to establish that California was not intended by Congress to be included in the phrase "interests of third persons" used in the Land Board Act of 1851. There is no such decision.

The government asserts that the Supreme Court has decided that Section 15 had made conclusive the decree and record in the proceedings before the Land Commission as against California and its successors in interest by the following holding:

"* * * The term 'third persons', as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the *government* in disposing of the property (492).

"As *against the government* this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming *under* the government by title *subsequent*" (492). [Italics supplied.]

Beard v. Federy, 70 U. S. 478, 492, 492.

To the same effect, More v. Steinbach, 127 U. S. 70, 83; Knight v. U. S. Land Assn., 142 U. S. 161.

In all three of these cases, one of the parties relied on the record of the proceedings before the Land Commission, with a decree actually in favor of the Mexican claimant. In none of these cases, nor in any of the many cited by the government, was there any contention raised that, in the proceedings embodied in the record, the government had an interest in maintaining the position of the opposing Mexican claimant, and hence had not conducted a true adversary defense. In none was the decree drawn, as it was here, with findings and conclusions aimed to make it final against the government's cestui que trust.

That is to say, in none was the court taking cognizance of such equitable "interest of third persons", as emerged in this case upon the confession of the government that it had bought its adversary title and then failed to defend its pretendedly opposed claim, and thereby connived at and procured a decree which was consciously drawn to destroy the "third person" right.

Beard v. Federy, supra, 492, speaks of the effect of the record only where it confirms some Mexican claim of title. It holds no more than that. So far as such a Mexican confirmation is concerned, "As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent."

Here, however, the question is whether the "record" "is conclusive" in favor of the government and against the parties claiming under the government by title acquired from the government prior to the record. In that regard the California claim is clearly within the Beard v. Federy definition of a "superior title" such as could "resist successfully any action of the government in disposing of the property" for a Naval Reserve.

It must be remembered that the government's bill confesses the acquisition of the alleged Mexican title from Bissell and Aspinwall on January 4, 1858 (Tr. 8) that is before any step in the trial was taken. The decree in the "record", which the government claims Section 15 makes conclusive against California and its successors in interest, finds this acquisition of title from the claimant by the supposed adversary government, whereby the adversary character of the proceeding ceases. It then finds, in effect, that since California's successors in interest are "claiming by, under, and through" the government they are parties in the action because they "are chargeable with notice thereof." The decree then holds, "therefore, that no rights of third persons have intervened or could intervene."

This extraordinary portion of the record which the government claims is made conclusive against the appellants by Section 15 of the Land Commission Act is repeated:

"And it further appearing, that all the right, title, and interest of the Appellees herein in and to the said claim, have passed to and

have been acquired by the United States, the Appellant herein, by purchase from the said Appellees [Jan. 4, *1853*] and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.

"Now, therefore, on motion of Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, Attorney for said Appellant, made on the 15th day of April, 1930, that a decree be entered Nunc Pro tunc in conformity with the said Order and the Court now being fully advised in the premises, the said Motion is hereby granted and it is hereby ordered that this decree of confirmation in said cause confirming in all particulars the decision of said Board of Land Commissioners be entered Nunc Pro Tunc, as of the 2nd day of March, in the year *1857*. [Italics supplied.]

"Dated in open Court this 15th day of April 1930."

(Tr. 290, 291.)

The language of Section 15 on which the government claims the decree is conclusive against the State of California, is plainly contra to this contention. The conclusiveness is confined to the government and Mexican claimant by the use of the word "only." The language of Section 15 is, "That final decrees * * * shall be conclusive between the United States and the claimant *only*." [Italics supplied.] This language clearly excludes the decree's conclusiveness as to claims between the government and California. There is nothing in Beard v. Federy, supra, or subsequent cases relying on it, which purports to decide anything on the controversy between the California interest and the government, presented in the instant case.

We hold the government's contention cannot prevail. The decree it relies on is not made conclusive by Section 15 of the Act as against California and its successors, and, in this proceeding in equity, California had and its successors have "the interest of third person" not parties but alien to the record in which the decree appears.

V. (c) The suit in the District Court rendering the decree relied upon, and the prior proceeding before the Land Board require the adjudication of the validity of Mexican claims of title with all the elements of judicial functions.

Even if the claimants of the California title had been permitted to sue the United States at law in ejectment, they would maintain their patent title as against the decree in the Land Board proceedings, since that was a one-party non-adversary action in which the Commissioners and District Court had no issue before them, and hence jurisdiction of nothing for their adjudication.

Since the action of Bissell and Aspinwall v. the United States ceased and determined in January 1853, when, before testimony taken, the United States acquired their claim, there has been nothing subjudice since that date which would prevent the issue of a patent to California.

All the authorities are agreed that the provisions of the Treaty of Guadalupe Hidalgo, providing for the recognition of Mexican titles and interests, are not self-executing. The Treaty imposes merely a political obligation, and it was necessary that its provisions should be implemented by Congressional action. Beard v. Federy, 3 Wall. 478, 491; Knight v. U. S. Land Comm., 142 U. S. 161, 184, 186, 188; Foster v. Neilson, 2 Pet. 253, 314, 315; Barker v. Harvey, 181 U. S. 481, 486, 487.

This the Congress could have done by various legislative provisions. Among others, it could have provided that in all the Federal and State tribunals in which the land was situated, the Mexican claimant could commence an action quasi in rem against all persons claiming adverse interest, in which the United States and any other adverse claimant might or might not appear as it was advised. There are many examples of this form of action. See Johnson v. North Star Lumber Co. (CCA–9) 206 Fed. 624, 628; Ennis-Brown v. Central Pacific Ry. Co., (CCA–9) 235 Fed. 825.

Obviously had such a form of action been created the statute would not contain the provision that the decree rendered "shall not affect the interests of third persons." There would be no third persons.

Instead, however, the United States created the Board of Land Commissioners, in which the claimant of the Mexican title would be the sole party, in a plaintiff capacity, and the United States should be, as against each claimant, the adverse defendant. From this Board decision either party could appeal to the District Court, where the issue was tried de novo.

This adversary character appears from the following provisions of the Act of 1851 creating the Board of Land Commissioners. Section 4 provides for the law agent of the United States to attend the meetings of the Board and gather the testimony "in behalf of the United States", and attend the taking of all depositions, notice of which must be given to him or to the United States District Attorney. Similar notice must be given by the United States to the claimant of the Mexican title.

Section 8 provided that:

"* * * it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim."

By Section 9 the unsuccessful party may seek review of the decree of the Board in the District Court. Here service was required upon the successful adversary, who was "bound to answer" as in any other adversary action. Thereupon the "case shall stand for trial", not only upon the evidence before the Board but upon other evidence offered—that is, a trial de novo. By Section 10 appeal was allowed to the Supreme Court by the "party against whom the judgment was rendered."

These provisions show that the duty of the Board to "ascertain and settle" the validity of the Mexican claim was to ascertain and settle

it as between the two adverse parties. Of course, the United States, as defendant, could admit the validity of the claim, either by an express statement in the record or, as with the case of any defendant, by failing to appear and oppose after service of notice of the pendency of the action; but this no more removes its adversary character than such admission in a common law action makes a common law action non-adversary.

That the action before the Land Board and the District and Supreme Courts is truly judicial in character has been repeatedly held by the Supreme Court:

"Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed and unjustly claimed, to present his demand to a tribunal *possessing all the elements of judicial functions, with a guarantee of judicial proceedings*, so that his title could be established if it was found to be valid, or rejected if it was invalid. [Italics supplied.]

Botiller v. Dominquez (1889), 130 U. S. 238, 250.

See also Grisar v. McDowell, 73 U. S. 363, 374; Beard v. Federy (1866), 70 U. S. 478, 480; U. S. v. Throckmorton (1878), 98 U. S. 61, 64; Boyle v. Hinds (1874), 3 Fed. Cas. #1759, p. 1111.

The Supreme Court early held, in a case at law, that in an action in which the real party in interest is both plaintiff and defendant where there is no issue presented of which the court can take jurisdiction, any purported decree on judgment or other action taken in such a pretended suit, if not totally null and void, is at least not binding upon anyone not appearing. The invalidity is at law, and does not rest on the creation of any equitable obligation in the person claiming the benefit of the judgment. The leading case is Lord v. Veazie (1849), 8 How. 251, in which the pertinent facts are found in the order dismissing the writ of error, as follows (256):

"Order. This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maine, and was argued by counsel, and it appearing to the court here, *from the affidavit and other evidence filed in the case by Mr. Moor, in behalf of third persons not parties to this suit*, that there is *no real dispute between the plaintiff and defendant in this suit, but, on the contrary, that their interest is one and the same*, and is *adverse to the interests of the persons aforesaid*, it is the opinion of this court, that *the judgment of the circuit court entered pro forma in this case is a nullity and void*, and that no writ of error will lie upon it. On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error be, and the same is hereby, dismissed, each party paying his own costs, and that this case be, and the same is hereby, remanded to the said court, to be dealt with as law and justice may require." [Italics supplied.]

The reasoning of the opinion is (8 How. 255, 256):

"It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves—and to do this upon the full hearing

of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.

"The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens that for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. *But there must be an actual controversy and adverse interests.* The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. *The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.*

"A judgment entered under such circumstances, and for such purposes is a mere form. The whole proceeding was in contempt of the court, and *highly reprehensible*, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. *A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.* This writ is, therefore, dismissed." [Italics supplied.]

Concerning the violation of professional ethics involved in so imposing on the court, the Supreme Court justifies the position of Attorney General Cushing in refusing to continue the prosecution of the Bissell and Aspinwall case before the Board (8 How. 264):

"It is proper to say that the counsel who argued here the motion to dismiss, in behalf of the parties to the suit stand entirely acquitted of any participation in the purposes for which these proceedings were instituted; and indeed could have had none, as they

were not counsel in the circuit court, and had no concern with the case until after it came before this court. And we are bound to presume that the counsel who conducted the case in the court below were equally uninformed of the design and object of these parties; *and that they would not knowingly have represented to the court that a feigned controversy was a real one.*" [Italics supplied.]

A case which, if anything, is even stronger upon its facts is Cleveland v. Chamberlain (1862), 1 Black 417. There the proceeding was in fact adversary throughout the trial in the lower court and until after judgment was rendered against Chamberlain. Pending appeal, Chamberlain acquired the interest of Cleveland and sought to continue the litigation for the purpose of adversely affecting the rights of those who were not parties. The Supreme Court held that the rule of Lord v. Veazie, supra, was entirely applicable, saying (at p. 425):

"This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.

"*There is no material difference between this case and that of Lord v. Veazie* (8 How. 254), when the whole proceeding was justly rebuked by the court as 'in contempt of the court, and highly reprehensible.' That case originated in a collusion between the parties. In this case the appellee, who was a judgment-creditor of the La Crosse and Milwaukie railroad, filed his bill to set aside a fraudulent conveyance of the debtors' property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respondent. The case was prosecuted with vigor by the complainant till a decree was obtained (on the 11th of February 1859), setting aside the various assignments, and the case 'committed to a master to ascertain and report the annual income of the several lots described in the bill', &c. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on 12th of February 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the decree was entered, Chamberlain became the equitable owner of Cleveland's judgment, and the 'dominus litis' on both sides. He then agreed to pay counsel, who appeared for Cleveland, the appellee, but for anything that appears without the knowledge of the counsel, who, in July 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.

"*It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee.* It differs from the case just cited in this alone, that *there* both parties colluded to get up

an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy.

"We repeat, therefore, what was said by the court in that case: 'Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.'" [Italics supplied.]

To the same effect and applying the same principles are:

South Spring Hill Gold M. Co. v. Amador Medean Gold M. Co. (1892), 145 U. S. 300;
Weaver v. Kelly (CCA-5, 1899), 92 Fed. 417;
The W. Talbot Dodge (1926), 15 Fed. (2) 459;
Corchrane v. Deener (1877), 95 U. S. 355, 356;
American Wood Paper Co. v. Heft (1869), 75 U. S. 333, 336;
Muskrat v. U. S. (1911), 219 U. S. 346, 361;
Nor. Pac. Ry. Co. v. Boyd (1913), 228 U. S. 482, 505, 506;
McArthur v. Scott (1885), 113 U. S. 340, 404;
People ex rel. Oliver v. Knopf (1902), 64 N. E. 842, 848;
Board of Supervisors v. Buckley, 38 So. 104, 106, 107;
Nor. Pac. Ry. Co. v. Snohomish County, 172 Pac. 878, 879–880.

We hold that the motion to strike from the evidence the judgment and record in the Bissell and Aspinwall case should have been granted, because, as soon as the Castro title was acquired by the United States, that case presented no issue of an adversary character upon which the District Court or the Land Board could take jurisdiction.

The principle of these cases answers the government's contention that the patents should be cancelled because the Castro claim was subjudice during all the seventy-three years the government refrained to take, in the Bissell and Aspinwall action, a judgment, apparently against itself, but really in its favor. Since the government seriously urges this proposition in addition to all its other actions and contentions of ethical significance, in its attempt to keep its Naval Station lands from the appellants, it may be remarked that it has shown restraint in not waiting for, say, another century, in entering the Bissell and Aspinwall judgment.

We further hold that, since there was no such action pending, there was nothing there subjudice, and hence nothing there to prevent the issue of the patents.

VI. The Treaty of Guadalupe Hidalgo did not reserve lands not granted by the Mexican Government, because Bissell and Aspinwall claimed Castro had received a grant, of which there is no evidence whatsoever. There was no withdrawal of such or any unknown claims to lands in New Mexico and California until Congress created tribunals for their determination.

The government contends that, because Bissell and Aspinwall asserted claim to a non-existent grant of the lands by the Mexican Government, which the United States Attorney in Bouldin v. Phelps, supra, established was executed after the Treaty of Guadalupe Hidalgo, they must be deemed withdrawn by that Treaty. It will be remembered that, even assuming the evidence in the Bissell record as competent against California, under the decisions of the Supreme Court Castro had no title at all; so the question is one entirely apart from the effect of the treaty as withdrawing inchoate titles perfectable before American tribunals.

The government does not cite a case from the score or more Mexican grant cases decided by the Supreme Court which holds that there is such a treaty withdrawal of any lands, much less of lands to which no title whatever is granted. On the contrary, there are two cases squarely holding against the contention, and many others where such a withdrawal by that treaty would have made unnecessary the extended discussion concerning the existence and effect of a withdrawal by congressional legislation subsequent to the treaty.

The two holdings that the treaty did not constitute such a withdrawal are Lockhart v. Johnson, 181 U. S. 516, and Lane v. Watts, 235 U. S. 17, 22. Among cases failing to recognize such a treaty withdrawal and treating the lands only as later withdrawn when subjudice under proceedings provided by statutes enacted after the treaty are Newhall v. Sanger, 92 U. S. 761; Cameron v. U. S., 148 U. S. 301; and Southern Pacific Ry. v. U. S., 200 U. S. 354.

Besides California, the lands ceded by the treaty included those constituting the Territory of New Mexico. It is apparent that the parties signing the treaty at Guadalupe Hidalgo in 1848 did not look forward to no treaty withdrawal of claimed lands in New Mexico and a withdrawal by the same treaty of the lands in California.

To facilitate the determination of the Mexican claims to lands in these two areas, Congress in 1851 created the Land Board to consider the California claims, and in 1854 gave similar powers to the Surveyor General for the Territory of New Mexico. While these tribunals had before them claims to these lands, they were deemed reserved from entry for the period that they were subjudice. The question of their status as public lands, subject to disposition as such, prior to the acts creating the functions of the Land Board and the Surveyor General, and subsequent to their rejection of claims, was before the Supreme Court in the first two cases. Their status, while subjudice, was before these tribunals in the last three.

In Lockhart v. Johnson, supra, a Mexican title to lands in New Mexico was subjudice before the Surveyor and hence withdrawn from entry by the terms of the Act of 1854. The Supreme Court, after construing an amendment to the act, made on March 3, 1891, held that the lands were no longer withdrawn from entry by any act of Congress. A mining claim was then made which was within the claimed limits of the grant but thereafter found to be outside.

It will be noted that, unlike the Castro claim, here was a valid Mexican grant. Its unsurveyed boundaries were not then determined.

The court held the lands open to entry and sale under the laws of the United States, though within the claimed limits of the Mexican grant, unless such lands were "reserved from entry and sale or other disposition by the United States by reason of the provisions of the treaty with Mexico" (521). In deciding that there was no such reservation of the ceded lands by the treaty the Supreme Court held:

"We see nothing in the terms of that treaty, either in the eighth or ninth article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. *The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale* (522).

* * * * * * *

"*The lands were in fact and have been since their cession to this country public lands of the United States*, although during the period between the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined (525, 526).

* * * * * * *

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied. Wolsey v. Champman, 101 U. S. 755, 769; Hewitt v. Schultz, 180 U. S. 139 (520).

* * * * * * *

"Nor does the case of Newhall v. Sanger, 92 U. S. 761, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was subjudice at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad were not embraced in the Congressional grant to the company. The decision went upon the ground that *the legislation of Congress* had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. The act of *March 3, 1851*, 9 Stat. 631, §18, which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of *its* provisions, the lands were not public lands under the laws of the United States until the claims thereto had been

either barred by lapse of time or rejected. The sixth section of the *act of 1853*, March 3, 10 Stat. 244, 246, was also referred to as *expressly excepting* all lands claimed under any foreign grant or title" (525). [Italics supplied.]

Lockhart v. Johnson, 181 U. S. 516, 520, 521, 522, 525, 526.

In Lane v. Watts the court repeats the holding of Lockhart v. Johnson:

"The mere fact of a claimed Mexican grant did not reserve the lands covered by it. Lockhart v. Johnson, supra. It was only after their presentation to the Surveyor-General of New Mexico for his report thereon that the lands were reserved 'until the final action of Congress.' *There was no reservation except by this statute* and it related only to lands covered by a claim presented to the Surveyor-General. *There is no language in the treaties which implies a reservation.* Lockhart v. Johnson, at p. 523." [Italics supplied.]

Lane v. Watts, 235 U. S. 17, 22.

The cases of Cameron v. U. S.; Newhall v. Sanger; and Southern Pac. v. U. S., all would have avoided pages of discussion in holding they were withdrawn by congressional act, if the mere treaty had constituted the withdrawal.

In Cameron v. U. S. the land was in fact subjudice, the Mexican title being then in question before the Congress, the Surveyor General having reported the Mexican title to Congress and the Congress failing to act upon it at the time it was claimed to be public land of the United States. The opinion holds that:

"In this case there is an express finding that the report of the surveyor general limiting the grant to four square leagues has never been finally acted upon by Congress, and that the claim and report *are still pending before Congress;* in other words, *that the claim is subjudice.*" [Italics supplied.]

Cameron v. U. S., 148 U. S. 301, 310, 311.

In Newhall v. Sanger, supra, a claim to certain land under a Mexican grant was still subjudice under the proceedings of the act of March 3, 1851, when Congress purported to grant the same lands to the Western Pacific Railway. Instead of relying upon a reservation arising from the Treaty of Guadalupe Hidalgo and extending until an adjudication of Mexican claims, it bases its decision on the congressional withdrawal by the act of March 3, 1851:

"It is unnecessary to dwell longer upon this question, or to review subsequent statutes touching the government lands in California. It suffices to say that there is nothing in any of them which weakens the construction we have given to the act of *1851.* This controversy depends upon *that act* and the Pacific Railroad acts which we have cited." [Italics supplied.]

Newhall v. Sanger, 92 U. S. 761, 765.

We can see nothing in the dicta in Quinn v. Chapman, 111 U. S. 445, 446, and U. S. v. McLaughlin, 127 U. S. 428, 454, which interprets differently Newhall v. Sanger. Certainly no theory of withdrawal by treaty was then recognized by the Supreme Court. If

such a doctrine had been established it would have been applied in Cameron v. U. S., decided seven years later, and in the several subsequent cases relying only on the withdrawal while subjudice in proceedings under statutes.

Eight years later, Lockhart v. Johnson so interprets Newhall v. Sanger as relying solely on withdrawal by the subsequent statute and not by treaty.

In Southern Pacific v. U. S., 200 U. S. 354, 357, instead of holding the lands claimed under the Mexican grant were withdrawn by the treaty, the Supreme Court opens its opinion with the sentence, "The single question is whether these lands were between the dates of the two surveys subjudice, and therefore not passing under the grant to the railroad company" (357). The Mexican grant had been held valid but the survey provided by the Land Board act had not yet determined the area. The grant to the railroad was made prior to the survey of the Mexican claim. The court held the land was withdrawn because subjudice. It does not mention the treaty, much less that it withdrew the lands and thus overrule the Lockhart v. Johnson decision, decided five years previously, and differ from the subsequent decision of Lane v. Watts.

We therefore hold that the Treaty of Guadalupe Hidalgo did not withdraw the lands on the invalid claim of Castro, and that in 1850 they were subject to the disposition of Congress by the swamp and overflow grant.

There is a serious practical objection to an overruling of Lockhart v. Johnson and Lane v. Watts. The principal occupation of Californians at the time of the cession was the grazing of livestock. In the north-central, central, and southern parts of the state there is no summer rainfall or green pasture on their uplands. The swampy lands with their green summer feed are principally located in the great central basin in the Delta and lower reaches of the Sacramento and San Joaquin rivers, and the borders of San Francisco, San Pablo, and Suisun bays. They are filled by the late spring freshets from the Sierra snows or by the brackish backwaters of the bays. Naturally, the cattle raisers seeking Mexican grants desired to have them included with the summer dry upland. The Supreme Court in Wright v. Roseberry, supra, estimates the area of California swamp and overflowed land at 2,000,000 acres. Of the claimed Mexican titles presented to the Land Board, 190 were rejected, covering approximately 3,000,000 acres. Morrow's Spanish and Mexican Private Land Grants, p. 14.

Obviously among these rejected titles was a very large area of swamp and overflowed lands which have since been acquired in private ownership from California. There has been no grant to the state except in the swamp and overflow act of 1850. While claims held invalid by the Land Board are declared in § 13 of the Act of 1851 to be "deemed part of the public domain of the United States", this does mean that they were public lands in 1850 when the swamp

land grant was made. If, as now claimed, they were withdrawn then by the treaty they were not restored to California by their rejection by the Land Board. The 1850 grant being in praesenti could not grant lands restored to the public domain.

In 1857, when a large part of the Mexican claims to California lands were still subjudice and very little of the California swamp lands had been reported to the General Land Office, Congress enacted that swamp lands selected and reported to the Land Office prior to March 3, 1857, were then confirmed. The act applied to all the states, not particularly to California. This is the only congressional confirmation of the grant of 1850.

In 1866 the question of swamp land titles in California had become more acute. Congress passed an act, 43 U. S. C. A., § 987, ordering a certification to California of all lands in approved township plants. The determination of what lands should be on such approved township surveys should be based on a report of a survey of which land was swamp and overflowed "under the grant" of 1850. If the treaty reserved the vast body of land invalid but claimed as Mexican grants it was not "under the grant" which could convey to California only public lands not so reserved.

If we were to hold that the Treaty of Guadalupe Hidalgo caused a withdrawal of all claimed but invalid titles and that they were not conveyed to the State of California, the title to them is unsettled. It is not for us to suggest what would be the status of such swamp lands if excepted from the 1850 grant to California by a treaty withdrawal such as claimed by the government. We merely point out the possible serious results in unsettling titles if the government's contention is maintained.

Appellee's prayer for the cancellation of the patents to the State of California is denied.

In response to appellants' prayer that their title be quieted against the United States, we hold that the United States has no title to the patented lands and that the title is in and quieted in appellants.

Reversed.

HAMEY, *Circuit Judge*, dissenting:

The decision in this case is important, not for the mere fact that the government has expended $2,000,000 on improvements on the land in question, but because under the doctrine of the majority opinion, none of the hundreds of Mexican grants in California are immune to attack. As the statement of facts is somewhat scattered throughout the majority opinion, I restate them for a better understanding of the case.

I. STATEMENT OF FACTS

(A) THE LAND IN QUESTION

The land in controversy was at one time designated as "swamp and overflow Land Survey No. 34." There is involved a question

as to whether or not the land is a part of Mare Island; if it is not, it is very close to the island, being depicted on most maps as a part thereof. The southern part of the island is used by the government as a navy yard. The northern part of the island, obtained by certain claimants in San Francisco Sav. Union v. Irwin (C. C. Cal.), 28 F. 708, affirmed 136 U. S. 578, was known as "Swamp and Overflow Land Survey No. 569." The southern boundary of No. 569 is the northern boundary of the land in controversy, and the southern boundary of this latter tract is about one mile south of the northern boundary. The area of the tract in question originally was 164.55 acres, but because of accretions, consists now of about 500 acres.

The western boundary of the tract is San Pablo Bay, and the eastern boundary is the Napa River. The island, including the tract involved herein, lies nearly in direction from northwest to southeast.

(B) HISTORY OF APPELLANTS' CLAIMS

By the Act of September 9, 1850, Ch. 50 (9 Stat. 452), California was admitted as one of the United States.

The Act of September 28, 1850, Ch. 84 (9 Stat. 519), provided that "the whole of those *swamp* and *overflowed* lands, made *unfit* thereby *for cultivation*, which shall remain *unsold* at the passage of this act, shall be, and the same are hereby, granted to said State" of Arkansas. Another provision of the act provided "that the provisions of this act be extended to, and their benefits be conferred upon, each of the other States in the Union in which such swamp and overflowed lands, known as designated aforesaid, may be situated." [Italics supplied.]

On June 11 and 12, 1855, one Patton, then County Surveyor for Solano County, California, made a survey of the land in controversy, as "swamp or tule" land, for one David N. Darlington. On October 10, 1856, a survey was made

"for David N. Darlington, by David P. Wade County Surveyor of Solano County through Em. A. de'Hemecourt deputy."

The survey covered the land in question and was called "Survey No. 34", and in this survey it was said:

"The whole being swamp and overflowed land to the full intent and meaning of an act of the legislature of this state entitled an act to provide for the disposal of the Swamp and overflowed land belonging to this state, passed April 28th, 1855, and surveyed in accordance with the provisions of said act and the directions of the Surveyor General of the State of California."

On March 18, 1857, the State of California issued a patent to the land in question to Darlington.

The Act of July 23, 1866, Ch. 219 (14 Stat. 218), provided that "it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed, all lands represented as such" on approved plats of township surveys made under authority of the United States.

The State of California, by an act of its legislature, approved March 27, 1872, with respect to patents theretofore issued by it, conveyed "all its right, title, and interest in and to the lands in such patents described."

One E. H. Sawyer brought an action of ejectment against the then commandant of the navy yard at Mare Island and another to recover possession of the land involved herein. Judgment was rendered for defendants because the court held that it was necessary for plaintiff to prove a legal title in himself, and as he had not shown a patent from the United States to the State of California, the legal title still remained in the United States. Sawyer v. Osterhaus (D. C. Cal.), 212 F. 765, decided February 7, 1914. In that opinion, p. 775, it is said "that the lands in suit were at the date in question, and continued to be down to a period long after their survey for plaintiff's predecessors, strictly within the definition of tide lands, as distinguished from swamp lands."

A letter dated September 16, 1914, from the Commissioner of the General Land Office to Register and Receiver at San Francisco, states that the State of California by its State Surveyor General applied for the certification to it of the land in question as "swamp and overflowed" lands on July 29, 1912. The Commissioner by this letter rejected the application for two reasons:

"1. No segregation survey of said swamp and overflowed lands, showing their location and area, has been approved. 2. If they be on Mare Island, that was in private ownership under a Mexican grant since May 20, 1841, and so was not subject to the grant made by the Act of September 28, 1850 (9 Stat. 519)."

The United States Surveyor General for California, on January 6, 1915, instructed one W. J. Lightfoot, United States Surveyor, to examine and investigate certain alleged swamp lands, and his report referred to the land in question as "swamp and overflowed." Similar instructions were given to one Francis E. Joy, on January 27, 1921, to make a report on "Lands Properly Belonging To Mare Island." His report was submitted on October 23, 1922, wherein it was said:

"The results of my investigations and observations * * * lead me to believe that there is no doubt that water at extra high tides * * * crossed over * * * [the questioned tract] and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore * * * more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast * * *."

In 1924 the United States, in the Supreme Court of the District of Columbia, on the relation of one of the appellees herein, filed a petition to obtain a writ of mandamus against the Secretary of the Interior requiring the latter to determine whether or not the land in question was swamp and overflowed land. A writ was issued on

May 29, 1924, and in response thereto the following decision by the Secretary was made on January 10, 1925:

"From the evidence before me I am led to the conclusion that the body or strip of land known as Survey No. 34, was at the date of the swamp-land grant of September 28, 1850, swamp in character; * * * Accordingly, it is hereby declared to be swamp land, and, as such, subject to patent to the State of California in the absence of other sufficient reasons."

Thereafter, the Secretary of the Interior refused to certify the lands for patent to the State of California. On May 25, 1925, the same party in the action above outlined filed a petition for a writ requiring the Secretary to "certify said lands for patent to the State of California." The writ was granted on October 29, 1926, and the judgment was affirmed on appeal (23 F. (2d) 136), the court saying, p. 138: "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises."

The patent covering this land from the United States to the State of California is dated March 9, 1928.

The appellants deraign their title from Darlington.

(C) HISTORY OF APPELLEE'S CLAIM

The Government claims title derived from a Mexican grant to one Castro.

The Congress of United Mexican States decreed on August 18, 1824, the colonization act. It provided:

"2d. The objects of this law are those national lands which are neither private property nor belonging to any corporation or pueblo, and can therefore be colonized.

"3d. To this end the Congress of the States will form, as soon as possible, the laws and regulations of colonization of their respective demarcation, with entire conformity to the constitutive act, the general constitution, and the rules established in this law.

"4th. Those territories comprised * * * within ten leagues of the seacoast cannot be colonized without the previous approval of the supreme general executive power." (Executive Document No. 17, p. 139, dated January 21, 1850; Reynolds, Spanish and Mexican Laws, 1895, p. 121.)

On November 21, 1828, the rules and regulations for the colonization of territories were promulgated. Among them were:

"1st. The governors * * * of the territories are authorized * * * to grant vacant lands in their respective territories to such * * * private persons * * * who may ask for them, for the purpose of cultivating and inhabiting them.

"2d. Every person soliciting lands * * * shall address to the governor of the respective territory a petition, expressing his name

[etc.] * * * describing as distinctly as possible, by means of a map, the land asked for. * * *

"4th. * * * The governor will accede or not to such petition, in exact conformity to the laws on the subject, and especially to the beforementioned one of the 18th of August 1824.

"5th. The grants made to * * * private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents * * * shall be forwarded to it.

"6th. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision. * * *

"8th. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given.

"9th. The necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the land granted, and the circumstantial report shall be forwarded quarterly to the supreme government." (Executive Document, supra, p. 141; Reynolds, supra, p. 141.)

Jose Victor Castro, on October 30, 1840, petitioned the governor of California for a grant of "an adjacent Island in the Bay of San Francisco, called 'Mare Island', which has no owners." The next day the governor ad interim granted permission to Castro "to occupy with horses the island called la Yegna, in the Straits of Carquinez", which permission was also signed by the secretary ad interim. Subsequently Castro renewed his petition, and the following writing was made on the paper upon which the permission had been written:

"Juan B. Alvarado, duly commissioned constitutional governor of the Department of California.

"Whereas Dn. Victor Castro, a Mexican by birth, has petitioned this government for ownership of the island named la Yegu, situated near the Carquinez Straits, in consequence whereof the foregoing license was given him by Dn. Manuel Ximeno Casarin, in charge ad interim of this government, and by virtue of the fact that the petitioner has again repeated his petitions proving that said island does not belong to the ownership of any individual, pueblo, nor corporation. I have by means of a decree of this date declared, as I now declare by these presents, Dn. Victor Castro owner of the property of the said island in all its extent in conformity with the powers conferred upon me by the supreme national government.

"In consequence let this be delivered to the interested party in order that it may serve him as evidence of his title and for such other purpose as may be convenient.

"Given at Monterrey, Capital of the Department, on the 20th day of May 1841.

"JUAN B. ALVARADO."

The treaty of Guadalupe Hidalgo was proclaimed July 4, 1848. This treaty provided that the Mexican grants "preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals." It was also provided:

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California * * * up to the 13th of May 1846 * * *."

One Bissell and one Aspinwall became vested with the title to whatever interest Castro had acquired by the above mentioned grant by mesne conveyances. By the Act of March 3, 1851, Ch. 41 (9 Stat. 631), a commission consisting of three commissioners was constituted "for the purpose of *ascertaining* and *settling* private land claims in the State of California." [Italics supplied.] This act provided that anyone claiming title to lands in California derived from a Spanish or Mexican grant, must within two years present his claim to the commission which must render a decision on the validity of the claim. Section 9 provided for a review of such decision by the District Court, and Section 10 provided for an appeal to the Supreme Court. With respect to all lands, the claims to which were not presented to the commission within the two year period, such lands were to be considered as a part of the public domain. A claimant, whose claim was finally confirmed, could receive a patent upon his presentation to the general land office of his certificate of confirmation "and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be finally to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

By Section 11 of the act it was provided:

"That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

Section 15 provided that the final decrees rendered, or any patent issued, under the act "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

The act of August 31, 1852, Ch. 108 (10 Stat. 76), provided for an automatic appeal from the decision of the commissioners to the District Court in accordance with certain conditions therein specified.

On August 31, 1852, Bissell and Aspinwall presented their claim to the land commission.

Negotiations commenced on behalf of the government on July 23, 1852, to purchase Mare Island culminated in the purchase from the

assignees of Castro, of the island for $83,491.00 by deed dated January 4, 1853, pursuant to the authority contained in the Act of August 31, 1852, Ch. 109, §3 (10 Stat. 100, 104).

The facts concerning this purchase are not disclosed in the proceedings before the commission. The first proceeding taken by the commission after the petition was presented and filed, occurred on April 20, 1854. Further proceedings were had thereafter, but the record in that proceeding discloses no evidence showing that the alleged grant was recorded in the Mexican archives. The case was submitted on briefs and taken under advisement by the commission on November 7, 1854.

On May 8, 1855, the commission delivered an opinion, stating in part:

"Strong suspicion has been raised by the testimony as to the genuineness of the grant * * *

"* * * from the facts before us we do not feel warranted in discrediting entirely the testimony of Governor Alvarado, and if any force is given to it, it must be for the full extent of his statements, and in that event, this claim must be confirmed and a decree herein will be entered accordingly."

On the same date a decree of confirmation was entered, wherein it is said:

"* * * it is adjudged by the Commission that the claim of the said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.

"The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegue' or Mare Island, and being an Island is bounded by the water's edge."

On February 1, 1856, notice of appeal to the District Court was filed, and on March 2, 1857, the District Court entered its decree, which is unsigned, affirming the decision of the commissioners that the grant "is a good and valid claim and that the said claim be, and the same is hereby, confirmed to the said 'Isla de la Yegua' or 'Mare Island' with its natural boundaries."

On April 1, 1857, a minute order allowing an appeal to the Supreme Court was made, and thereafter during that year (the day and month not being disclosed) the parties stipulated that such appeal be vacated "and that claimants have leave to proceed under the decree of this court heretofore rendered in their favor, as under Final Decree." A minute entry of an order of the District Court referring to the same matter uses language identical to that above quoted. Both minute orders are unsigned.

On April 15, 1930, a decree nunc pro tunc was entered in the District Court, stating, among other things—

"That the said claim be, and the same is hereby, confirmed to the said 'Isla de la Yegua' or 'Mare Island' with its natural boundaries."

(D) THE ISSUES

On November 24, 1930, appellee filed its bill alleging that a grant was made by the instrument hereinabove referred to; that the grant was confirmed by a decree of the Land Commission; that on petition for review the lower court ordered judgment to be entered on March 2, 1857; that the decree of the lower court was entered on April 15, 1930; and that appellants are bound by the decree, because they claim under and in privity with appellee against whom the decree was rendered. The facts concerning the purchase of the land in question for $83,491.00 were alleged, as were the reservations, and the occupation of the lands in question by appellee since September 16, 1853.

The bill further alleged the issuance of the Darlington patent; that appellants claim some title and right to the land in question by virtue of mesne conveyances; and that "each of said claims is wholly without right or foundation in law or fact"; that appellee issued a patent to the State of California, but that the same "is null and void and is without force and effect and has no validity." Appellee prayed that the patent issued to the State of California, the patent issued by the latter to Darlington, and the mesne conveyances mentioned be declared void, and the same be surrendered for cancellation; that appellants be adjudged to have no title or interest in the lands in question, and that appellee be adjudged to be the owner in fee simple absolute, and possessed of the lands in question.

Appellants answered, alleging generally that the Castro grant was void and never finally confirmed, and that appellee had no right, title, or interest in the land in question because the patent to the State of California and the Darlington patents were valid.

The Court decreed in favor of appellee, from which this appeal was taken.

(E) QUESTIONS PRESENTED

The mere fact that appellee issued a patent does not conclude an attack against it, for, as said in Steel v. Smelting Co., 106 U. S. 447, 452, that if the lands covered by the patent "never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action." The reason for such rule is found in Davis's Administrator v. Weibbold, 139 U. S. 507, 509, where it is said that such patents—"are conclusive in such actions [referring to actions of the land department] of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved

from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed."

And in United States v. Conway, 175 U. S. 60, 68, it is said that "nothing is better settled by this court than that a patent issued by the United States to lands which they do not own is a simple nullity", citing cases.

In the light of the pleadings, then, it is apparent that our first inquiry is directed to the question as to whether or not the United States owned the lands in question at the time of the conveyance thereof to the state. We may assume that such conveyance occurred, if at all, at the time of the enactment of the Swamp Act, for if it did not own the lands at that time, the state acquired nothing. I believe this is conceded by both parties. The majority likewise agree, for it says that if the land was granted to Castro in 1841, "the United States did not acquire these lands from Mexico in the cession of area now constituting the State of California, and hence they were not granted to California by the Act of 1850."

In determining whether or not the lands in question were owned by appellee at the time of the enactment of the Swamp Act, it is alleged that the prior grant to Castro was confirmed by the Land Commission and by the District Court. The answers, taken in connection with contentions of appellants, present three issues: (1) Was there a decree of confirmation actually entered? (2) If so, was it valid? (3) If so, is it binding on appellants?

II. Confirmation of the Castro Grant

(A) Decree of Confirmation was Entered

It is conceded that the Commission entered and signed the decree mentioned. No reason appears why the rendition of the decree of the District Court on March 2, 1857, was not made, except that such decree was unsigned. I see no reason why that decree is invalid. I find neither statute nor decision which requires the judge to sign a decree in the federal court. 33 C. J. 1212, § 152; 15 R. C. L. 585, § 21; and see Secombe v. Steele, 61 U. S. (20 How.) 94, 102. Nothing in Equity Rule 3 requires it. The act creating the Land Commission says in § 10 that "The District Court shall proceed to render judgment" but nothing requires the judgment to be signed. It therefore appears that the nunc pro tunc decree did nothing more than was already done.

However, since the parties have made no point of it, I do not need to rest the conclusion that the Castro grant was in fact confirmed, on the point just mentioned, for the decree of the Commission is conclusive until vacated. Beard v. Federy, 70 U. S. (3 Wall.) 478, 492. Cf. Central National Bank v. Stevens, 169 U. S. 432, 459.

We must, therefore, accept the conclusion that the grant was in fact confirmed under either theory mentioned.

(B) VALIDITY OF THE DECREE OF CONFIRMATION

First. It is not contended that the decree is void because the Commission did not have jurisdiction over the persons of the claimants, and the United States, and no such contention could be made, for the claimants and the United States submitted to the jurisdiction of the Commission and the District Court.

Second. Appellants originally contended that the decree was void because it was rendered on insufficient evidence, in that there was no evidence before the Commission that the Castro grant was recorded in the archives of Mexico, or for other reasons requiring proof by evidence. This contention is disposed of by the following quotation from Beard v. Federy, supra, 489:

"The board having acquired jurisdiction, the validity of the claim presented and whether it was entitled to confirmation were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here—that when it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity."

Further, whether or not the grant was valid is a conclusion of law to be drawn from the facts. After the term at which a judgment or decree was rendered has expired, such judgment or decree, except on appeal therefrom, cannot be set aside upon the sole ground that it is erroneous as a matter of law. The Bank of The United States v. Moss, 47 U. S. (6 How.) 31.

On rehearing, appellants concede the correctness of that holding by saying: "We readily admit that, except upon direct appeal, a decree of confirmation may not be questioned because of any inadequacy of the evidence upon which it is based."

Third. Appellants also contended that upon purchase of the Bissell and Aspinwall claim prior to determination thereof by the Commission the controversy ended, and so none was pending when the Commission entered its decree.

There are two answers to that contention: the Commission had jurisdiction, after presentation of the claim, regardless of whether or not a controversy existed; and there was in fact a controversy.

The act creating the commission begins with the statement "That for the purpose of ascertaining and settling private land claims in the State of California * * *" The only purposes of the act were stated to be "ascertaining * * * private land claims" and "settling private land claims." Thus the jurisdiction of the Commission was extended to the problem of ascertaining what grants were in existence. Ascertaining what grants were in existence was important to the United States in regard to the newly acquired lands, as shown by More v. Steinbach, 127 U. S. 70, 81, and Newhall v. Sanger, 92 U. S. 761, 763, et seq. It is obvious that grants could be

ascertained without the existence of a controversy, and that, therefore, its jurisdiction did not depend on the existence of a controversy.

The majority now holds that the duty thus stated "was to ascertain and settle it as between two adverse parties." It says that such a conclusion follows from certain provisions of the act. That the provisions do not state expressly that such is the fact, is shown by a perusal of them. That the provisions contain no such meaning by implication, is shown by the fact that they, on their face, relate to cases where there was in fact a controversy.

The second reason why the contention of appellants is unsound is that there was in fact a controversy. The officers of the United States were required to be present at all hearings before the commissioners. Even in the case of perfect grants, such officers had the duty to prevent encroachment on the public lands by claimants under their grants or, in other words, to see that the claimants did not claim more than actually belonged to them. Appellants on rehearing deny the application of that statement saying: "Surely it will not be contended that the United States had a controversy with itself to prevent its claiming as against itself more land than it was entitled to." From this, I understand that it is argued that officers of the United States may violate duties imposed by statute whenever their judgments so dictate. I do not understand that to be the law. The statute prescribes the duty as stated, and all the wisdom appellants may muster cannot controvert it. It is for Congress to prescribe the duty, not appellants. The presumption is that the officers performed their duty, and appellants have not overcome it.

A further reason why there was in fact a controversy is that even at the time of the decree of the land commissioners, the United States under the theory of the majority, that the land was conveyed to California, still held the legal title because no patent had been issued. Michigan Land & Timber Co. v. Rust, 168 U. S. 589. Therefore there was a contest between the holder of the legal title against persons claiming it. It was exactly so held in Sawyer v. Osterhaus, supra, and the decree in that case is res judicata because appellants claim under the plaintiff in that case, and are in privity with him. Dowell v. Applegate, 152 U. S. 327, 343; Litchfield v. Goodnow, 123 U. S. 549, 550.

Fourth. The majority holds that appellee was trustee for California at the time of the decree of the Commission, and that it violated its duties as trustee in haphazardly or perfunctorily contesting the Castro claim to the detriment of the cestui, and therefore appellee "can take no advantage from the proceeding before the Commission."

That argument is based on the assumption that actually the equitable title passed only if the land was public at the time the swamp act was passed. And to determine that question, one must first determine whether the decree of the Land Commission can be attacked, because if not, California received no interest whatever. The holding is analogous to the homely examples of the cart pulling the horse, and crossing the bridge before it is reached. Attaching the word "equity"

to a court does not permit it to transmit power to the cart to pull the horse nor does it permit the bridge to be crossed before it is reached.

The fallacy in the holding of the majority is that the grant is attacked without first considering whether or not the decree is subject to attack, and once having successfully attacked the grant, the result thereof is the establishment of an equitable title, which is then used as a basis for an attack upon the decree. But the existence of the equitable title arises from a successful attack on the decree. Such reasoning, in my opinion, has neither beginning nor end.

That is what I said in the original dissent, and it is now applicable. Appellants, on rehearing, erroneously state:

"The dissenting opinion conceives that the majority opinion reasons in a circle, the argument in this connection being this: that the confirmation proceedings cannot be attacked, except by one having an equity in the property; that the majority assume that the United States held the legal title in trust for the State under the Swamp Land Act and that therefore the appellants, as successors in interest, may question the confirmation proceedings; whereas, so it is urged, until the confirmation proceedings are disposed of no equity in the State is shown which would give it, or appellants as its successors in interest, any standing to attack the proceedings."

Nowhere did I state that "one having an equity in the property" could attack the confirmation proceedings. In fact, the statement is untrue. One might own an equity under a claimant before the Commission, but under § 15 of the act he could not attack the confirmation proceedings.

The majority answer this argument by saying:

"* * * Implicit in this bill, so recognizing the patents which it seeks to cancel, is the recognition of the status of the United States as holder of the bare legal title in 1850, at the time of the grant to California, in trust for California as its cestui, having the whole equitable interest."

Let us see what the bill recognizes. After alleging the issuance of the patent by appellee to appellants, it is alleged that such patent

"* * * is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership under and by virtue of the aforesaid grant from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act and were not a part and never had been a part of the public domain * * *."

Several other reasons were alleged in the bill as grounds for the allegation that the patent was void. I am unable to agree with the majority holding with respect to this specific matter in view of such allegations.

Appellants on rehearing offer the following observation with respect to my conclusion that the majority reasoning was circuitous:

"This line of argument, we respectfully suggest, wholly misconceives the position of appellants. They are not claiming that, because the Government held the legal title in trust for the State, they are free to attack the confirmation proceedings. *Appellants are not in any true sense attacking those proceedings at all.* Their claim is merely that those proceedings, be they good or bad, are not binding upon them * * *." [Italics supplied.]

These statements were either made erroneously or appellants now wish to change the theory heretofore urged. Proof of my statement is found in appellants' briefs, where I find nearly 15 pages devoted to an attack upon the decree of confirmation. In their brief they say: "We submit, upon the grounds stated, that the decree of the Land Commission was and is void, and upon the same grounds the nunc pro tunc decree was and is void"; "We need not pause to inquire the effect on the Castro claim of the void decrees"; and in the Resume: "It results, therefore, that on each of the grounds stated the Land Board, and equally the District Court, was without jurisdiction or power to confirm the Castro grant, and being so without power or jurisdiction the decrees, respectively, of the Land Board and the District Court are nullities." A similar statement is made in appellant's reply brief.

The point herein under discussion was not originally made by appellants. It seems to me from the above quotation that appellants disclaimed any intention of relying upon it in their petition for rehearing. If not, however, the fact that the reasoning is circuitous shows the fallacy in the argument, and I believe the correct conclusion is that it is untenable.

Fifth. As the case is presented to us, there is a presumption of validity of the decree of confirmation, and the burden is on appellants to overcome that presumption. I believe the foregoing discussion shows that none of the points raised are tenable; that therefore the Commission and the District Court had jurisdiction over the persons of the claimants and appellee, and over the subject-matter; and that therefore the decree is valid.

(C) EFFECT OF THE DECREE OF CONFIRMATION

Having established the validity of the decree of confirmation, I next consider its effect. Under § 13 of the act creating the commission, it is provided that "for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant" upon compliance with certain procedural conditions. With respect to claims finally rejected, and those not presented to the Commission within two years, it is provided that the lands so claimed shall be considered a part of the public domain.

In § 15 it is provided:

"* * * That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

First. That a grant once finally confirmed, as here, was to be protected against such forays as the one here presented, seems to have been definitely settled.

In Beard v. Federy, 70 U. S. (3 Wall.) 478, 492, involving the validity of a Mexican grant in California, it is said:

"* * * If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the 15th section * * *."

In Thompson v. Los Angeles F & M Co., 180 U. S. 72, 76, it is said:

"* * * The ultimate basis of the contention is that the court of private land claims had no jurisdiction to confirm the grant because the governor of the Californias had no power to convey the public land for a money consideration. That is to say, the grant being void it could not be the basis of a claim to lands 'by virtue of any right or title derived from the Spanish or Mexican government' * * *.

"We think that counsel put too limited a significance on the words of § 8, that the claim shall be 'by virtue of any right or title derived from the Spanish or Mexican government.' The words, of course were descriptive of the class of claims of which the board of land commissioners was given jurisdiction. They made a special tribunal of the board, limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the

claim—propositions of law or propositions of fact, the fact of a grant, or the power to grant—was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy * * *. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district court * * *."

These quotations seem to be decisive of the instant case. It is urged that there are two reasons why the rules therein stated are not applicable. Those will be considered next.

Second. Appellants for the first time have, on rehearing urged a new point which the majority, in its amended opinion, has held to be well founded. I quote from appellants' brief on rehearing:

"* * * appellants assert that, whatever the form, the fact of the matter is that the United States did not represent the State, for the reason that the interests of the United States were hostile and adverse to those of the State, and one who has an adverse interest cannot represent those to whose interests his own are hostile. The fact cannot be gainsaid that upon purchasing the interests of Bissell, Aspinwall and McArthur the United States was the only real party in interest on both sides of the proceeding * * *."

Under those facts it is said that the applicable law is that a decree given in a proceeding in which the real party in interest on both sides is the same, is "not binding upon any one other than the actual parties to the proceeding."

Assuming, without holding, that the rule as stated by appellants is correct, as applied to courts deriving their power from the Constitution, I explore the contention further to demonstrate its unsoundness.

The treaty of Guadalupe Hidalgo provided that "grantees may cause their legitimate [titles] to be acknowledged before the *American tribunals*." [Italics supplied.]

The following quotation from United States v. Ferreira, 54 U. S. (13 How.) 39, 45, respecting a somewhat similar treaty provision, is applicable:

"The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so."

In accordance with that principle the nature of the obligation under the present treaty is shown by the following from Beard v. Federy, 70 U. S. (3 Wall.) 478, 492:

"* * * * The obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation * * *."

And more specifically, it is stated in Grisar v. McDowell, 73 U. S. (6 Wall.) 363, 379:

"* * * * In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage."

This quotation was approved in Trenouth v. San Francisco, 100 U. S. 251, 255. See also: Astiazaran v. Santa Rita Mining Co., 148 U. S. 80, 81. It was held in Grisar v. McDowell, supra, where a claim was confirmed by the circuit court on appeal from a decree of confirmation made by the commission, and Congress thereafter confirmed the claim and modified the decree of the circuit court while appeal to the Supreme Court was pending, that the action of Congress was conclusive, and that the Supreme Court had no power to and could not affect the grant by its decision.

From these authorities I believe it is apparent that the discharge of the duties placed on the United States by the treaty was, in the first instance to be carried out by Congress. Congress performed the duties by establishing the land commission, and providing that when that tribunal made a decision with respect to a particular claim, the decree so made "shall be conclusive between the United States and said claimants." And as subsequently held by the Supreme Court, if the decree was conclusive upon those parties, it was equally conclusive on those who claimed under such parties. Congress has specified the condition, as it had the power to do, and we must give effect to that condition as it is written, without restricting or enlarging it. Reading into the provision quoted the effect of the decision of the majority we would then have the act read in effect: "The decree shall be conclusive between the United States and said claimants, excepting when made in proceedings where one party is the real party in interest on both sides."

I am content to let Congress pass the legislation and believe there is no authority in this court to usurp that function. Congress itself confirmed grants in New Mexico under the same treaty. (Act June 21, 1860, Ch. 167, 12 Stat. 71.) I am doubtful if even appellants would contend that such action of Congress could be held to be not binding on the ground of the exception herein proposed. Tameling v. United States Freehold, etc., Co., 93 U. S. 644, 662; Astiazaran v. Santa Rita Mining Co., supra. It is difficult to see how a decree of the commission, acting on behalf of and pursuant to authority conferred by Congress, can be held not binding on the same ground, since Congress did not so provide in the act.

With respect to the grants in California, Congress delegated its duty to a special commission. Although that commission is more in the nature of a Congressional Committee, some of the cases speak of it as exercising judicial functions. Statements in Astiazaran v. Santa Rita Mining Co., supra, imply that the commission was a court. Concede that fact, and it is still apparent that the authority of the court was only that given to it by the act of its creation; that it could confirm or reject grants only in the manner prescribed by the acts; that it did not function as a court with plenary powers, and was not intended as such. I believe that the foregoing conclusively shows that the confirmation by the commissioners was, except as to "third persons", to have the same effect with respect to attack such as this, as a confirmation by Congress, which, as the Supreme Court said in Tameling v. United States Freehold, etc., Co., supra, 662, was "conclusive, and therefore not subject to review in this or any other forum."

Third. It was originally contended by appellants that appellants were "third persons" within the meaning of § 15 of the act. The majority so held, but did not consider the complete statute.

Section 15 provides that "the final decrees rendered * * * shall be conclusive between the United States and said claimants only, and shall not affect the interests of third persons." It is quite clear from the statute that neither the United States nor the claimants can be "third persons." And it likewise means that all persons claiming under either the United States or the claimants are concluded, for in Beard v. Federy, supra, 492, speaking of the patent which follows the decree of confirmation, it was said: "As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent * * *." See also More v. Steinbach, supra, 83. In fact, that is merely the general principle prevailing in all suits to quiet title, that the decree concludes the parties and their privies. See Dowell v. Applegate, supra, and Litchfield v. Goodnow, supra. When the statement quoted from Beard v. Federy, supra, is read in connection with the statement appearing in the same paragraph, it is apparent that the only persons who could "hold superior titles, such as will enable them to resist successfully any action of the govern-

ment in disposing of the property" are those who claim under some title not descending from either the United States or the claimants. Here appellants claim under the United States and are concluded by the decree.

On rehearing, appellants concede that such contention is unsound law, saying:

"Nor is it our contention that, in the ordinary sense, the State of California and its successors in interest are 'third parties' within the meaning of Section 15 of the Land Commission Act. Were that question still open, we think it could be demonstrated that the State of California and these appellants were intended by Congress to be regarded as 'third persons' whose interests should not be affected by proceedings in confirmation. * * * But we concede that it has been decided otherwise by the Supreme Court in regard to this particular statute * * *."

Notwithstanding this concession, the majority on rehearing reiterates its holding, though on other grounds. In Lord v. Veazie, 49 U. S. (8 How.) 250, an action was brought on a covenant in "a written instrument, which purported to be a conveyance by Veazie to Lord of 250 shares of the stock of" a railroad company. The railroad company, chartered by the State of Maine, had executed a deed to a bank, "by virtue of which the bank claimed to hold the entire property of the" railroad company. Veazie by the written instrument covenanted that the property of the corporation was free and clear of encumbrances, and that the stockholders thereof had a right to use certain river waters, which, it was shown, was granted by the State of Maine to Moor and others. In the Supreme Court, Moor for himself and as counsel for the bank moved "to dismiss the appeal, upon the ground that it was a fictitious case, got up between said parties for the purpose of settling legal questions upon which he [and the bank] had a large amount of property depending." The motion to dismiss was sustained, the court saying, p. 255:

"* * * The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

Based on this case, the majority say that "it would require an unequivocal decision of the Supreme Court to establish that California was not intended by Congress to be included in the phrase 'interests of third persons' used in the Land Board Act of 1851." It is sufficient to point out that the case relied on did not construe the phrase in the act mentioned, because that case dealt with an ordinary action at law, and was decided two years before the act in question was enacted. In Beard v. Federy, supra, and More v. Steinbach, supra, the phrase was construed as used in the act in question. The construction so given is opposite to the one used by the majority, and is controlling.

(D) TIME WHEN CONFIRMATION TAKES EFFECT

In More v. Steinbach, 127 U. S. 70, 83, it is said:

"* * * The confirmation takes effect, by relation, as of the date of the first proceeding commenced before the land commissioners; and an adjudication that at that date it was valid is also an adjudication that it was valid at the date it was mde * * *."

As applied to the instant case, the Castro grant was made in 1841, and therefore the land covered thereby was not ceded to the United States as public land by the Treaty of Guadalupe Hidalgo. It follows that instead of the State of California receiving an equitable title under the Swamp Act of 1850, it, in my opinion, received nothing, which is the title appellants now have.

III. The Evidence

(A) COPY OF GRANT FROM DEED RECORDS

Appellee introduced into evidence a certified copy of the grant as recorded in the deed records of Sonoma County, California. The majority held such copy inadmissible because under California law "a certified copy of a document which is recorded in a county other than that where the land lies is not admissible."

In addition appellee introduced the record of the proceedings before the Commission in the Bissell case, as filed in the District Court. A copy of the grant was included in that record. Inasmuch as I believe the latter copy was admissible, it is unnecessary to discuss the holding of the deed record copy.

(B) ADMISSIBILITY OF THE BISSELL RECORD

The majority holds that the entire record in the Bissell case is inadmissible in the instant case, for the same reason it holds the decree not binding on appellants. I have heretofore discussed those reasons, and I believe, shown them to be untenable, and therefore such record is admissible.

(C) COPY OF GRANT FROM THE BISSELL RECORD

Appellee opened its case with testimony of the loss of papers and records.

Witness Iva Frances Bailey testified on behalf of appellee, as follows:

"I am an employee in the office of the United States Surveyor General for California and have been there for thirty-seven years. Prior to the San Francisco earthquake and fire in 1906, there was in the possession and in the custody of that office the records and archives of the Mexican Government of California, also the records of land claims under Spanish grants presented to the Land Com-

mission in California. I understand that all original papers connected with the grant were also on file in the office. The effect of the fire of 1906 was a total destruction of all of these papers with the exception of a few that were in the safe."

Witness Frank E. Barker testified on behalf of appellee, as follows:

"I am the office cadastral engineer in the Office of the Public Survey, which was formerly the United States Surveyor General for California. I have been there since 1909. I have had occasion to make a search through the archives of the Mexican Government prior to the acquisition of California by the United States and have found some of them. The proceedings before the Land Commission in the case of the confirmation of Mare Island I have been unable to find. There appears to be an incomplete expediente on the original documents that were submitted as exhibits to the Land Commission at the time of the application for confirmation. I do not find the original document of the grant from Juan B. Alvarado to Castro, * * *."

The majority stated, in its opinion, with respect to the Castro grant: "No original document was offered by the government or its absence explained. There is absence of search or proof of loss."

Ordinarily the original grant would have been in the possession of the land commission after the hearing. To show that the original grant was presented to the commission, I quote from its opinion confirming the grant:

"The claimants in this case ask confirmation of their title which they derive from Victor Castro, by virtue of a grant issued to the said Castro, on the 20th day of May 1841, by Governor Juan B. Alvarado, and have offered in evidence in support of their claim the *original grant* to the said Castro * * *." [Italics supplied.]

There are also numerous other references in the record of the proceedings before the land commission showing that the original grant was "filed" with it.

Upon completion of its work, the land commission deposited its records in the office of the Surveyor-General. The act of May 18, 1858, Ch. 39, § 1 (11 Stat. 289), made it the duty of the Secretary of the Interior to cause to be collected and deposited in the same office, "all official books, papers, instruments of writing, documents, archives * * * that may be found in the unauthorized possession of any individual * * *." By the same act the Surveyor-General was required to safely keep such documents. The presumption is that the officers performed their duties. In the absence of proof to the contrary, we must presume that the original grant was in the possession of the Surveyor-General of California.

This is sufficient to show, that if we consider the record of the proceedings before the Land Commission, filed with the District Court, the original grant was in fact filed with the Commission. On the other hand, if we do not so consider such record, then we

must presume that it was in the hands of the Surveyor-General, so that under either theory the Surveyor-General did in fact have the original grant. The evidence quoted shows the loss or destruction thereof. In view of what has been said, there seems to be justification for the suggestion that the statements quoted from the original majority opinion were improvidently made.

As amended on rehearing, the majority holds that the copy of the grant in the Bissell record is inadmissible because: (1) "all the authorities are agreed that a thorough search for the original must be made" in order for a copy of an ancient document to be admissible, and "no such search was proved to have been made by the government in this case"; and (2) it does not appear from the record of the Bissell case "that there was any deposit or recordation in the public archives of the Republic of Mexico of the claimed grant to Castro."

With respect to the majority holding that the copy of the grant in the Bissell record is inadmissible because there was no proof of a thorough search for the original, the testimony quoted, I believe, shows the contrary.

With respect to the second holding that there must be proof of recordation of the grant in the Mexican archives, I believe the majority has confused this suit with a proceeding before the Land Commission. In the latter, such recordation should be shown. But after action by the Commission on the claim presented, and its final affirmance, the parties cannot thereafter in a separate suit require proof of such facts. If such proof were required it would be contrary to Beard v. Federy, supra, and Thompson v. Los Angeles F. & M. Co., supra. It is there shown that if a patent is issued pursuant to a decree confirming a grant, it is that "record" which is conclusive, or in other words, parties rely on their patents. Here, of course, there was no necessity for appellee to issue a patent to itself. Under such circumstances, I doubt that the original grant, or a copy thereof, need be shown in a separate suit, such as this. No reason appears why the decree itself should not be sufficient.

IV. Property Covered by the Grant

The Castro grant conveyed the "island in all its extent." The question arises as to whether this description is sufficient to cover the land in question.

It has been mentioned that the Sloat Board commenced negotiations for the purchase of the island on July 23, 1852. The next day in reply to the letter from the Sloat Board, Bissell answered that he would sell his interest in the island at "$250 Two hundred & fifty dollars per acre, for that portion of the 'Island' lying south of the main body of the tule or low ground and $50 Fifty dollars per acre for that portion lying north of the high or dry land, the first supposed to contain about nine hundred acres and the last about thirteen hundred acres." On July 7, 1852, Bissell offered to sell "the whole

Island" for $160,000. The contract entered into between the owners and the government dated December 10, 1852, described the property to be conveyed as:

"* * * Mare Island * * * including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same * * * and all privileges, rights, or claims to the waters, harbors, and creeks supposed or claimed to belong to the same tract known as Mare Island."

On December 13, 1852, the Secretary of the Navy wrote the Sloat Board asking their estimate of the value of Mare Island "with all its appendages." On the same date, this board advised the Secretary the amount of their estimate, stating that "the Island including the tule opposite Vallejo contains about nine hundred acres in addition to a large tract of tule" which description included the land in controversy.

The actual deed, dated January 4, 1853, described the property as:

"Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and March belonging to the same or which has ever been reputed or claimed to belong to the same * * *."

On February 9, 1853, the Secretary of Navy wrote the President stating that he was contemplating the selection of Mare Island as the site of the Navy Yard and Naval Depot in pursuance of the act of August 31, 1852, Ch. 109, § 3 (10 Stat. 100, 104); that "Negotiations have been in progress for the purchase of this island and its appendages for some time past"; that there was some doubt as to whether or not the United States did not at that time own title to the land, and theretofore requested the reservation of

"Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island * * *."

On February 11, 1853, the President made the reservations recommended, and the following day the Secretary of Navy advised the Secretary of the Interior of the reservation, describing the land in the identical language quoted. This last letter was answered by the Commissioner of the General Land Office, on February 16, 1853, advising that the order of reservation had been duly recorded in his office.

The opinion of the Attorney-General, of April 9, 1853, said:

"I am satisfied that the State of California may set up, and probably maintain, title, as against the United States, to so much of Mare Island as is subject to overflow by water, whether periodically or otherwise; that is, at least, to all below high water mark."

A decree of confirmation by the Commission on May 8, 1855, confirmed the grant to Mare Island, describing it as "an Island is bounded by the water's edge." The unsigned decree of the District Court,

March 2, 1857, confirmed the grant to Mare Island "with its natural boundaries."

The land in controversy was shown as a part of Mare Island in the Dyer Survey, approved by the United States Surveyor General of California, on September 17, 1863.

On September 17, 1873, the chief of the Bureau of Yards and Docks, Navy Department, acting under authority of the Secretary of Navy, appointed a board of civil engineers to present a plan for the development of the navy yard at Mare Island.

The commandant of the Navy Yard, Mare Island, wrote the Chief of the Bureau on September 26, 1873, that "Mare Island" included the land here in controversy.

The board thus appointed, on September 17, 1873, made its report on November 19, 1873, from which we quote:

"The extreme length of this island, including a large tract of tule on the northern side, and extending toward Napa and Sonoma, is about 10 miles, and its average width, including tule, about three-quarters of a mile.

"The area of upland is 741 acres, and of the tulelands on the east side, which will be available for yard purposes, is 135 acres.

"No accurate measurement has been made of the area of the tule on the northern side, but an approximate area is 3,973 acres * * *.

"Soon after our arrival the commandant of the yard * * * informed us that a question had been raised as to the validity of the title held by the United States to the tract of tule on the northerly side of the island * * *."

The Commandant of the Mare Island Navy Yard advised the Register at Sacramento, California, on November 24, 1873, that the United States claimed the land here in question, and likewise advised the Board of Supervisors of Solano County, California, by letter dated the following day.

The United States Surveyor-General instructed one Freeman to make a survey of Mare Island (in accordance with the Act of July 1, 1864, Ch. 194, 13 Stat. 332), on July 19, 1877. Freeman made his survey thereafter, showing the land in question, and the area of Mare Island as 5,337.22 acres. Notice that the survey had been made was published in accordance with the act. On July 5, 1879, an attorney for the then alleged owners of the land in controversy protested against the Freeman Survey to the Surveyor-General, and on July 16, 1879, protested likewise to the Commissioner of the Land Office. On August 7, 1879, the Surveyor-General forwarded the Survey to the Commissioner, saying that the survey should be limited to the lands lying south of those in controversy, and:

"I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide lands * * *."

It does not appear that the Freeman survey was approved by the Commissioner as provided in the Act. Evidence was also introduced to show that one E. H. Sawyer (referring to Sawyer v. Osterhaus, supra) was, at the time the letter of the Surveyor-General was written, the corresponding clerk who wrote the letter.

On December 22, 1883, the Chief of the Bureau of Yards and Docks advised the Secretary of the Navy that "Mare Island" included the "tule" or "swamp" land in dispute.

In a corrected report of Spanish and Mexican Grants in California complete to February 25, 1886, prepared by the State Surveyor-General "G. W. P. Bissell et al." are shown as "confirmee" of Mare Island, the area of which is shown to be 5,527.22 acres.

In San Francisco Sav. Union v. Irwin (decided July 8, 1886), supra, it is indicated that the land in question was not covered by the grant.

In Sawyer v. Osterhaus, supra, decided February 7, 1914, it is said that the land in controversy "is physically a part of the body of land officially known and designated as 'Mare Island.'"

The Commissioner of the General Land Office wrote the Register and Receiver at San Francisco on September 16, 1914, regarding certification to the State of California of certain swamp lands on Mare Island, saying that "As the whole of the island was granted to Castro, such a description would include the lowland or the tule and marsh, as well as the high or uplands."

United States Surveyor Lightfoot, acting under instructions of the Surveyor-General, dated January 6, 1915, made his report of examination and investigation of alleged "Swamp and Overflowed" land and extent of Mare Island that the land in question was a part of Mare Island.

Francis E. Joy, United States Cadastral Engineer, acting under instructions of United States Surveyor-General, dated January 27, 1921, made his report on "Lands Properly Belonging To Mare Island", on October 23, 1922. His opinion seemed to be that the lands in question were tidelands, and his plat sent with the report was not accepted and was ordered revised. The revised plat was accepted on November 8, 1923, and shows the land in question as a part of Mare Island.

One of the appellants herein brought suit in the District of Columbia against the Secretary of the Interior, in which suit on May 27, 1924, a peremptory writ of mandamus was issued directing the Secretary to decide whether the land here in question was or was not "swamp land" on September 28, 1850. On January 10, 1925, the Secretary decided that such lands were swamp in character, and "that it was above ordinary high-water mark and formed a contiguous body attached to the higher portion of Mare Island."

On February 12, 1925, the Secretary of the Navy wrote the Secretary of the Interior concerning this land, and, after outlining certain facts, said:

"From the foregoing it seems clear that the grant to Victor Castro of Mare Island 'in the entire extent' included all of the tule lands which physically formed an integral part thereof. If it had been intended to eliminate the tule lands from this grant, such sweeping language would not have been used. The words 'in the entire extent' clearly indicate that it was intended to grant all lands which in any way were connected with and formed part of Mare Island."

Many maps were introduced in evidence. Nineteen of these maps were dated in 1850 or prior, the earliest being dated 1775, being a Spanish map by Ayala. Four of the maps were dated in 1850. Of these, three were made by Ringgold, of the United States Coast Survey Map. From this evidence it is quite possible to infer that Mare Island included the land in question. Approximately thirty maps, dated from 1851 to 1931, were also introduced. In all but two or three of these maps Mare Island is depicted as including the land in controversy.

There was also introduced in evidence a plat showing cross-sections of the land in controversy. The line of the mean high tide is shown and the line of the surface of the land is depicted by using notes of surveys made in 1850 to 1852. The plat is some evidence that the land in controversy was in 1850 higher than the line of mean high tide.

Some of the foregoing evidence is inadmissible, and with respect thereto consideration has been given to it herein for historic purposes only, some of it of only slight probative effect, but considering the difficulty now of proving the extent of the island at the time of the confirmation I believe that the admissible evidence before us shows that the land in controversy was at such time above the line of mean high tide, as the trial court held.

In the United States v. Pacheco, 69 U. S. (2 Wall.) 587, it is said: "By the common law the shore of the sea and, of course, of arms of the sea is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails * * *."

The decree of confirmation, stating the boundary as "the water's edge", would therefore mean the line of mean high tide, and such a description would include the land in question.

V. Other Questions

Appellee contends, also that from the time of the cession until the grant was finally confirmed or rejected, the lands ceded were reserved, and therefore could not pass to the state under the Swamp Act.

In San Francisco v. Le Roy, 138 U. S. 656, 670, it was said that the Swamp Act "was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect." Appellee also contends that the evidence shows posession of the land in question by Castro, which is an equitable claim (without the necessity of considering the decree), and therefore the land could not pass to the state.

Discussion of these questions is unnecessary in view of the conclusion I have heretofore reached.

In retrospect it seems to me that appellants' concessions on rehearing have made it impossible to legally support a title in appellants. The decision of the District Court should be affirmed.

For the reasons above set forth, I dissent from the majority opinion as amended and from the order denying the petition for rehearing.

(Endorsed:) Amended Opinion and Dissenting Opinion. Filed June 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7522

James E. O'Donnell, et al., appellants

vs.

United States of America, appellee

Appeal from the District Court of the United States for the Northern District of California, Southern Division

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with instructions to enter a decree that the United States has no title to the patented lands in suit, and that the title is in and quieted in appellants.

(Endorsed:) Decree. Filed, and entered, October 22, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7522

JAMES E. O'DONNELL, JUANITA O'DONNELL, HIS WIFE, FLETCHER M. SLOSSON, DOROTHY SLOSSON, HIS WIFE, AND OTHERS, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Praecipe for entry of appearance

The Clerk will enter our appearance as counsel for appellants, in association with the present counsel for appellants, Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway.

WARREN OLNEY, JR.,
ROBERT L. LIPMAN,
1500 Balfour Building, San Francisco, California.

(Endorsed:) Praecipe for entry of appearance. Filed and appearances entered Nov. 2, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, June 7, 1937

Before WILBUR, DENMAN, AND MATHEWS, Circuit Judges

Order directing amendment of opinion, denying petition for rehearing, etc.

By direction of the court, it is ordered that the opinion and dissenting opinion, heretofore rendered and filed on October 22, 1936, be amended pursuant to memoranda this day rendered, and, as amended, be filed as of today.

Pursuant thereto, and upon consideration of the petition of appellee, filed November 19, 1936, and within time allowed therefor by rule of court, for a rehearing of above cause, and of the appellant's reply to petition for rehearing, filed December 18, 1936, and of appellee's answer to appellants' reply, filed January 12, 1937, and by direction of the court, it is ordered that said petition be, and hereby is denied, Haney, Circuit Judge, dissenting.

Order extending time within which to apply for writ of certiorari

On consideration of the application of counsel for the United States of America in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended to and including October 7, 1937.

Dated August 19, 1937.

(Signed) PIERCE BUTLER,
Associate Justice of the Supreme Court of the United States.

Order staying issuance of mandate

Upon application of Frank J. Hennessy, Esq., counsel for the Appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is, stayed to and including October 7, 1937; and in the event the petition for a writ of certiorari to be made by the Appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN,
United States Circuit Judge.

Dated SAN FRANCISCO, CALIFORNIA.

(Endorsed:) Order of Justice Butler, of Supreme Court, extending time to apply for certiorari, and order of Circuit Court of Appeals staying mandate. September 1, 1937. Paul P. O'Brien, Clerk.

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two volumes, consisting of one thousand and sixty-three (1,063) pages, numbered from and including 1 to and including 1063, together with original exhibits transmitted herewith, being Plaintiff's Exhibits: Nos. A–K, inc.; L–1 to L–5, inc.; L–6a, L–7, L–8, L–8a, L–8b, L–8c, L–9 to L–13, inc.; L–13a, L–13b, L–14, L–16 to L–31, inc.; L–31a, L–32 to L–38, inc.; M–U, V (See Ex. L–38), W–Z, inc.; Z–1. AA–YY, inc. Defendants' Exhibits: Nos. 2, 3, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 19, 26, 27, 28, 29, which were all of the original exhibits filed in this court on the hearing of above cause, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals made pursuant to request of Honorable Stanley Reed, Solicitor General of the United States, counsel for appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, this 23rd day of September 1937, at the City of San Francisco, in the State of California.

[SEAL]

PAUL P. O'BRIEN, *Clerk.*
By FRANK H. SCHMID, *Deputy Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938